IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1731

STATE OF NEW MEXICO and JAMES R. BACA,
Director, Department of Alcoholic Beverage Control,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The State of New Mexico and its Director of the Department of Alcoholic Beverage Control petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Judgment entered in this case by the United States District Court for the District of New Mexico on January 31, 1977 (App. A, pp. 1a-2a) is unreported. The District Court's Findings of Fact and Conclusions of Law of January 31, 1977 (App. B, pp. 3a-8a), and Opinion letter of December 16, 1976 (App. C, pp. 9a-10a), are also unreported. The Opinion of the United States Court

of Appeals for the Tenth Circuit (App. D, pp. 11a-22a) is reported at 590 F.2d 323 (1978).

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit were entered on December 18, 1978. By order of March 12, 1979, Mr. Justice White extended the time within which to file a Petition for a Writ of Certiorari to and including May 17, 1979 (App. E, p. 23a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

28 U.S.C. § 1161 provides that the criminal sections of the statute's title shall not apply to any act or transaction within any area of Indian country "provided such act or transaction is *in conformity* both *with the laws of the State* in which such act or transaction occurs" and with a duly-adopted tribal ordinance, certified by the Secretary of the Interior and published in the Federal Register (emphasis added).

1. Whether 18 U.S.C. § 1161 applies all State laws, including a State licensing requirement, to liquor transactions in Indian country.

2. Whether 18 U.S.C. § 1161 authorizes State enforcement of its laws with respect to liquor transactions in Indian country.

3. Whether an Indian-operated resort, under 18 U.S.C. § 1161 and the Twenty-First Amendment to the Constitution, is entitled to immunize itself and the persons with whom it deals from criminal penalties when that resort caters almost exclusively to non-Indians, at least half of its employees are non-Indian, the resort is a nationally and internationally known tourist attraction competing

with non-Indian establishments not only for the liquor trade but for a variety of sports-related and convention activities, and the liquor bought by the resort is sent into the State through normal commercial channels, comes to rest outside Indian country, and is resold to the Indian-operated resort by regular commercial wholesalers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country *provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs* and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. [Emphasis added.]

Material portions of other pertinent constitutional and statutory provisions are included in Appendices I and J, pp. 33a-60a.

STATEMENT OF THE CASE

A. The Factual Background

This case involves the unlicensed sale of liquor at the Inn of the Mountain Gods located on the Mescalero Apache Indian Reservation in south central New Mexico. The Inn of the Mountain Gods is a spacious, deluxe, tourist resort complex featuring a luxurious hotel, a stocked lake for fishing, boating and water sports, a golf course, pro shop, tennis facilities, swimming pool, trap and skeet shooting range, a stables complex, paddle tennis

courts, restaurants, liquor lounges, and convention facilities (R. Vol. II, pp. 14-15, 37, 39, 54-55).[1] The Inn of the Mountain Gods is owned and operated by the Mescalero Apache Tribe as part of a tourism program established by the tribe to attract non-Indians to the Mescalero Apache Reservation as well as to the Sierra Blanca Ski Resort, which is a tribal commercial enterprise located adjacent to the reservation (R. Vol. II, pp. 19-20, 23, 49). In connection with the operation of the Inn of the Mountain Gods, the Mescalero Apache Tribe also maintains a hunting and fishing business, including "package" hunts of big game animals, and a camping and picnicking program. "Package" hunts of big game animals include hunting fees, lodging at the Inn, guide service, and various other hunter needs (R. Vol. II, p. 23). The Inn of the Mountain Gods caters almost exclusively to non-Indian patrons from across the country. At least 97% of the guests at the Inn of the Mountain Gods are non-Indians from off the reservation, and at least 50% of its employees are non-Indian, including the general manager and the bar manager (R. Vol. II, pp. 36, 42; see *Mescalero Apache Tribe* v. *State of New Mexico*, United States Court of Appeals, Tenth Circuit No. 78-1790, appeal pending). The Inn's liquor is supplied by off-reservation, non-Indian New Mexico wholesalers.

The Inn of the Mountain Gods is a $15,000,000.00 plus, completely federally financed, facility which is a nationally and internationally competitive tourist attraction (R. Vol. II, pp. 14-15, 29-30, 54-55). The Inn is expected to gross in excess of $90,000,000 in the twenty-year depreciation period of the facility (R. Vol. II, pp. 53-54). It is the largest and most spectacular tourism project to be built by the federal government on Indian land anywhere in the country (R. Vol. II, pp. 54-55, 61).

[1] "R. Vol." refers to a particular volume of the record as printed and filed in the Tenth Circuit.

Events surrounding the opening of the Inn of the Mountain Gods without a State liquor license in July of 1975 occasioned this jurisdictional conflict. The introduction, possession and sale of intoxicating beverages had been approved by the Mescalero Apache Tribe by an ordinance adopted in 1965 in order to allow liquor for its members and to promote tourism on the reservation (R. Vol. II, pp. 9-10, 12). The Mescalero Apache tribal liquor ordinance expressly provides that the introduction, possession or sale of intoxicating beverages within the Mescalero Apache Reservation would be lawful if done in conformity with the laws of the State of New Mexico (App. F, pp. 24a-25a). At the time the Inn of the Mountain Gods opened, there was pending for approval before the Director of the Department of Alcoholic Beverage Control a proposal to transfer to the Inn a tribally-owned license from another location on the reservation (R. Vol. II, p. 62). This transfer was later administratively denied, and the Mescalero Apache Tribe did not pursue available judicial review of the decision. The number of liquor licenses which may be issued under New Mexico law is limited by population and geographic area (App. I, pp. 38a-39a). Under these statutory quotas, no new license could have been issued at that time for the Inn of the Mountain Gods (R. Vol. II, pp. 21, 67). State liquor licenses may, however, be purchased or leased. Purchase of such a license would have cost approximately $50,000.00, the market price for licenses in the area (R. Vol. I, p. 164). Lease of such a license would have ranged between $1,000 to $1,200 a month (R. Vol. II, p. 70). The Mescalero Apache Tribe chose neither to buy nor lease the requisite license. Instead, it simply opened and began buying and dispensing intoxicating liquors. Acting on the advice of the Attorney General of New Mexico, the Director of the Department of Alcoholic Beverage Control ordered all State licensed liquor wholesalers to cease supplying the unlicensed tribal facility (App. G, pp. 26a-27a; R. Vol. I, p. 182).

The Mescalero Apache Reservation, which includes two other tribal liquor operations in addition to the Inn of the Mountain Gods (R. Vol. II, p. 63), is one of 26 Indian reservations and pueblos located within the State of New Mexico. These 26 Indian enclaves comprise 7,348,563 acres or 11,482 square miles. As of the present time, 10 of these Indian jurisdictions have enacted ordinances permitting the introduction, possession and sale of intoxicating beverages within their boundaries (App. H, pp. 28a-32a). Each of these other several Indian enclaves in New Mexico may likewise become a haven for non-Indian activity free of State law on the model of the Mescalero Apache enterprise.

On a larger scale, there are presently 104 tribes or reservations in 20 States which have passed ordinances pursuant to 18 U.S.C. § 1161 to permit the introduction, possession and sale of liquor within their boundaries (*id.*). If the decision below stands, these Indian jurisdictions will in all likelihood adopt the Mescalero model of tribal ownership and operation of liquor facilities in an attempt to free their tribal members and their largely non-Indian patrons from the requirements of State law and to avail themselves of the accompanying competitive advantages. See *Rehner* v. *Rice*, United States Court of Appeals, Ninth Circuit No. 77-2409, appeal pending.[2] Indeed, the Mescalero model is now being used widely with respect to other Indian enterprises, such as the big game or trophy hunting and fishing business, in an effort to immunize non-Indian sportsmen from State law for the commercial advantage of the Indian tribe. See, for example, *Confederated Tribes of Colville Indian Reservation* v. *State of Washington*, 591 F.2d 89 (9th Cir. 1979); *Mescalero Apache Tribe* v. *State of New*

[2] In this case, the District Court upheld under Section 1161 the authority of the State of California to require a Pala Indian operating a store on the Pala Reservation to obtain a State liquor license in order to sell distilled spirits.

Mexico, supra; White Mountain Apache Tribe v. *State of Arizona*, United States Court of Appeals, Ninth Circuit No. 78-3427, appeal pending; *State of North Carolina Dept. of Nat. and Econ. Resources* v. *Eastern Band of Cherokee Indians*, pet. for writ of certiorari to Fourth Circuit pending, No. 78-1653.

B. Proceedings in the Courts Below

Invoking the jurisdiction of the United States District Court under 28 U.S.C. § 1345, the United States, on behalf of the Mescalero Apache Tribe, brought this action against the State of New Mexico and its Director of the Department of Alcoholic Beverage Control, seeking a declaration that the Mescalero Apache Tribe has sole authority to license and regulate the sale of liquor at tribally operated commercial facilities located within the Mescalero Apache Reservation. The United States likewise sought preliminary and permanent injunctive relief enjoining the State of New Mexico from enforcing State laws concerning the licensing and regulation of the sale of liquor by the Mescalero Apache Tribe on the Mescalero Apache Reservation and, in addition, enjoining the State of New Mexico from taking any action against wholesale liquor suppliers which would result in a cessation of liquor supply to the tribally operated facilities (R. Vol. I, pp. 9-10).

The District Court ruled that 18 U.S.C. § 1161 delegates to the Mescalero Apache Tribe the sole authority to license and regulate the sale of alcoholic beverages at tribally operated facilities within the Mescalero Apache Reservation, so long as the Secretary of the Interior has certified a duly-adopted ordinance by the tribe, and that the federal statute does not require the tribe to obtain a State liquor license. The court further declared that the State of New Mexico has no authority to enter the Mescalero Apache Reservation to enforce State liquor

laws against tribally operated facilities, nor may it take any action against wholesale liquor suppliers that would result in the cessation of liquor supply to the tribally operated facilities. The court determined that the federal government had preempted State regulation, so that the State had no authority even under the Twenty-First Amendment to enforce its liquor laws with reference to the Mescalero Apache tribal liquor operations (R. Vol. I, pp. 159-166).

The United States Court of Appeals for the Tenth Circuit affirmed, holding that 18 U.S.C. § 1161 was not ". . . designed to grant licensing and regulation of liquor on tribal lands to the State of New Mexico" (App. D, p. 16a). While the Congress may delegate regulatory power in Indian country to the States, any such delegation ". . . must be in specific terms." According to the court below, Section 1161 does not delegate this authority either expressly or impliedly (App. D, p. 10a), and the State of New Mexico therefore cannot in any way participate in, or interfere with, the process by which the Mescalero Apache Tribe obtains or dispenses alcoholic beverages on its reservation.

REASONS FOR GRANTING THE PETITION

1. The primary issue in this litigation is whether and to what extent 18 U.S.C. § 1161 applies State liquor laws to liquor transactions occurring in Indian country, and how the application of these laws is to be enforced if they do apply. The first inquiry, then, is whether all State liquor laws, including the licensing requirement, apply to such transactions.

The courts below, surprisingly, said no. The District Court declared that no compliance in any measure with State law is required by Section 1161 with respect to liquor transactions occurring at tribally operated premises

within Indian country. The Tenth Circuit went further and held not only that the State could not enforce its liquor laws but that no compliance in any measure with State licensing procedures is required by Section 1161 with respect to liquor transactions *occurring anywhere in Indian country*, tribal premises or not. Even the United States did not advocate such an extreme construction of the statute in the proceedings below.

The Tenth Circuit's determination in this regard is based upon its conclusion that, despite Section 1161, the States have not been delegated regulatory authority over liquor traffic on Indian reservations. This conclusion misses the issue. The initial question again is simply whether, by virtue of Section 1161, State liquor laws apply to liquor transactions within Indian country, not whether such laws are to be enforced by the States if they do apply. That comes next. If State liquor laws do apply to such transactions, as the language of the statute clearly shows they do, then the unlicensed sale of liquor or any other departure from State liquor laws within Indian country is, at the very least, a violation of federal law. *United States* v. *Mazurie*, 419 U.S. 544 (1975). Whether it also gives the State and the tribe a basis to prosecute or to otherwise act is a separate question.

That all State liquor laws, including the licensing requirement, must apply to any liquor transaction anywhere in Indian country is evident from the language of the statute and is an inescapable conclusion from this Court's decision in *United States* v. *Mazurie*, *supra*. Section 1161 provides in pertinent part:

> The provisions of Sections 1154, 1156, 3113, 3488, and 3618 of this title, shall not apply . . . to any act or transaction within any area of Indian country *provided such act or transaction is in conformity both with the laws of the State* in which such act or transaction occurs and with an ordinance duly

> adopted by the tribe having jurisdiction over such area of Indian country. . . . [Emphasis added.]

By its terms, Section 1161 exempts from federal criminal penalty "any act or transaction" involving liquor within Indian country which "is in conformity *both* with the laws of the State" and "with . . . [a tribal] ordinance" (emphasis added). There is no limitation in the statute as to which State laws apply to liquor transactions in Indian country—all State laws apply, including the licensing provision. Nor does the statute say that State laws apply to liquor transactions in Indian country only if enforcement jurisdiction has likewise been delegated to the State by congressional action. Neither is there any indication that liquor transactions occurring at a tribally operated facility within Indian country are exempt from federal criminal penalty whether or not they conform with State law.

Indeed, in the *Mazurie* case, the introduction of liquor into Indian country without the tribal license required by the pertinent tribal ordinance was a sufficient basis for a federal criminal prosecution under Section 1154. The license requirement of the tribal ordinance was applicable to the transaction by virtue of Section 1161. The standard of conformity in Section 1161 as imposed in the *Mazurie* case with respect to a tribal ordinance must be the standard to be met with respect to State law as well, since the language imposing the standard is the same in either instance. The departure from the standard of conformity in the *Mazurie* case was a violation of federal law. Similarly, a departure from the requirements of State law would, at the very least, likewise be a violation of federal law subject to prosecution by the United States.

The conclusion that all State laws apply to liquor transactions occurring anywhere in Indian country by virtue of Section 1161 is also compelled by this Court's

decision in *California* v. *United States*, 438 U.S. 645 (1978). In that case, the United States attempted to impound water from a California river. The California State Water Resources Control Board ruled that the water could not be allocated to the United States under State law unless the United States agreed to and complied with various conditions dealing with the water use. Despite a provision in Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, to the effect that the Secretary of the Interior "shall proceed in conformity with such [State] laws . . .," the United States claimed that it could either ignore State law or make a pro forma application for State approval and then proceed regardless of the State ruling. This Court rejected these arguments and held that Congress intended for the Secretary to comply with the substance as well as the form of State law, and the Secretary was absolutely bound by State requirements.[3] The same reasoning applies here.

Despite the seemingly clear language of Section 1161,[4] as well as the direction of this Court's decisions in *United States* v. *Mazurie*, *supra*, and *California* v. *United States*, *supra*, the Tenth Circuit completely excluded State law from any application to any liquor transaction in any area of Indian country. State law simply has no part in the picture. This decision on the part of the Tenth Circuit would preclude even a federal prosecution under Sections

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[3] In *California*, unlike the instant case, Congress passed subsequent legislation giving new directives to the Secretary but providing that the Secretary should follow State law *unless* it was in conflict with the new directives. The case therefore had to be remanded on the issue of inconsistency. No such new legislation, and therefore no such issue of inconsistency, is involved here.

[4] This Court has recognized this lack of ambiguity by stating, ". . . the sale of liquor on reservations has been permitted *subject to state law*, or consent of the tribe itself." *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 74 (1962).

1154 or 1156 for failure to comply with State law.[5] The Tenth Circuit's opinion frees not only the Mescaleros but also the Mazuries and everyone else from the need to conform to State law when engaging in liquor transactions on Indian lands anywhere in this country. This extreme and, we submit, erroneous construction of Section 1161 alone warrants this Court's review in this case. As will be seen below, there are other compelling reasons as well.

2. Aside from the issue raised by the construction of Section 1161 in the courts below, the decision of the Tenth Circuit departs from the intent of Congress, which was to permit the States to enforce their own laws with respect to liquor transactions occurring within their territorial boundaries.

If State law applies to liquor transactions in Indian country as Section 1161 would clearly seem to require, then how and by whom are these laws to be enforced? As we have seen, a failure to conform to the requirements of State law should be considered, at the very least, a violation of federal law subject to prosecution by the United States. Do the States have a role in enforcing their own laws with respect to such transactions? The Tenth Circuit said no, concluding that delegation of regulatory authority to the States to enforce their laws with respect to liquor transactions in Indian country had to be spelled out in explicit and definitive terms. Section 1161 is not clear enough in this regard to satisfy the Tenth Circuit.

As a result of the decisions below, the 20 States in which the introduction, possession and sale of liquor in Indian country is now permissible, as well as the

[5] Indeed, the United States is permitting the Inn of the Mountain Gods to operate without conforming to the licensing requirement of State law.

States in which such introduction, possession and sale of liquor may hereafter become permissible, now have and will have nothing whatever to do with the procedure established in Section 1161 with respect to the application of State law to liquor transactions in Indian country. The States cannot license liquor transactions in Indian country; they cannot investigate alleged violations of, or enforce, their liquor laws; they cannot regulate in any way the delivery, possession, sale, service or consumption of liquor within Indian country; they cannot prosecute violations of their liquor control statutes. In other words, the States are to have no part whatever in determining whether, in fact, an act or transaction involving liquor in Indian country "is in conformity . . . with the laws of the State . . . ."

The complete ouster of the State regulatory and enforcement mechanism from any involvement in the control of liquor traffic within Indian country is simply not what Congress intended.[6] In the first place, as a practical mat-

[6] The Tenth Circuit describes Petitioners' legislative history showing as "particularly remote" (App. D, p. 21a). To the contrary, that history is very much to the point. Congressman Patten's original bill, which was limited to Arizona, provided in part that federal laws would not apply to any act or transaction off-reservation if the act or transaction was in conformity with State law, and would not apply to any act or transaction within a reservation if the act or transaction was in conformity with tribal law alone. H.R. 1055, Sections 2 and 3. (App. J, pp. 51a-53a). The Interior Department substitute, in language which was finally enacted and compiled as 18 U.S.C. § 1161, provided that various provisions of the federal law would not apply to an act or transaction involving liquor if the act or transaction was "in conformity both with" State laws and tribal ordinances. The Interior Department substitute combined Sections 2 and 3 of Congressman Patten's original bill and applied them to liquor in Indian country, precisely for the purpose of providing that every liquor transaction in Indian country be made subject to State law and, necessarily, State supervision and control.

Moreover, Section 3 of P.L. 83-277 (App. J, pp. 53a-54a) provided that New Mexico and Arizona *could*, but were not compelled to, amend their Constitutions to repeal prohibitions against the sale

ter, this result leaves the determination of whether transactions involving liquor in Indian country are, in fact, in conformity with State law entirely up to the United States, presumably in the person of the United States Attorney, no matter how the State may choose to interpret, apply and enforce its own laws in a given situation, and it leaves only a federal criminal prosecution under Sections 1154 or 1156 as the sole enforcement mechanism. These circumstances not only obviate effective and efficient control of liquor transactions within Indian country, but they even allow conflicting rules and policies to be applied—a situation which Congress could hardly have intended.[7] This is so, in part, because Section 1161 does not automatically assimilate State and tribal law as federal criminal offenses. There cannot be a federal criminal prosecution under Section 1161, for example, for selling liquor to a minor within Indian land, a State law offense. Instead, if there is a violation of State or tribal law, either Section 1154 or Section 1156 of 18 U.S.C. is applicable. However, there is no guarantee that the United States Attorney will read State law as a State prosecutor would read it, or, even if he did, that he would choose to prosecute the same violations that the State itself would deem important. Thus, serving beer to a minor, remaining open after hours, or refilling bottles may be considered too trival for prosecution by federal

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of liquor in Indian country. These were included at Congress' command in the Enabling Act for New Mexico and Arizona, Act of June 10, 1910, 36 Stat. 557. Had Congress construed 18 U.S.C. § 1161, enacted as Section 2 of P.L. 83-277, as permitting Indian tribes to operate liquor outlets free of State supervision and control, Section 3 of P.L. 83-277 and the Enabling Act would have been redundant.

[7] Indeed, in this case, contrary to the position of the State of New Mexico, the United States has chosen to ignore the State licensing requirement and has encouraged the Mescalero Apache Tribe to depart, rather than preventing the tribe from departing, from State law requirements.

authorities but might well be treated as serious matters in the context of a State's overall attempt to supervise and enforce the proper sale of liquor within its borders (see App. I).

At any rate, according to the Tenth Circuit, it is entirely up to the United States to decide what to do in these cases, regardless of State policy.[8] On the other hand, if the State regulatory and enforcement apparatus were applied, as Congress intended, then disciplinary action appropriate to the offense could be brought at least against the licensee.

In the second place, 18 U.S.C. § 1161 does not expressly exclude any State laws from applicability to liquor transactions occurring within Indian country, including the licensing requirement. It makes little sense, however, to apply the licensing requirement except as a component part of a regulatory and enforcement apparatus by which the licensee is controlled in the operation of his liquor business. This overall apparatus, it is submitted, is exactly what Congress intended. See *United States* v. *Mazurie*, *supra*. The concern of Congress with the lack of federal enforcement effort with respect to liquor in Indian country suggests that it simply would not leave the application and enforcement of State law solely to the federal government. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *State Legal Jurisdiction in Indian Country*, Hearings before the Subcommittee on Indian Affairs of the Interior and Insular Affairs Committee of

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[8] While the United States Attorney must, of course, find and apply State law in a secondary capacity in any number of situations, it is an entirely different matter to grant him complete and exclusive power to determine, apply and enforce State law in the first instance, occupying the combined powers of the Attorney General of the State and the State Supreme Court, without any possibility of deference to or control by proper State authorities. Such a result is not only demeaning to the State but obviously contrary to Congressional intent.

the House of Representatives on H.R. 459, H.R. 3235 and H.R. 3624, 82nd Cong., 2nd Sess. at 7-9 (1953).

This petition is not the proper forum to debate the extent of State regulatory authority—whether, for example, it encompasses the full spectrum of authority from initial investigation to criminal prosecution for illegal acts.[9] Such argument is better left to a full development on the merits. For present purposes, it is enough that the decisions below completely exclude the States from any and all participation in a determination as to whether an Indian tribe or anyone else buying and selling liquor within Indian country is acting "in conformity . . . with the laws" of that State. Such a conclusion goes far beyond a matter of incorrect statutory construction. It is a blow to "States rights" in that term's purest and best sense—the ability of a State to determine for itself the meaning, nature and extent of the law that, under our federal system, is to apply to activities within its borders.

3. The decisions below prohibit the States from enforcing the criminal provisions of their liquor laws even against non-Indian offenders within Indian country. The States, historically, have had jurisdiction over State criminal offenses committed on Indian lands when neither the accused nor the victim is an Indian. *United States* v. *McBratney*, 184 U.S. 651 (1881); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). This jurisdiction derives from the general principle that "in the absence of a limiting treaty obligation or congressional enactment, each State had a right to exercise jurisdiction over Indian reservations within its boundaries." *New York ex rel. Ray* v. *Martin*, *supra*, 326 U.S. at 499. This principle is rooted in the concept of federalism. There is nothing in the text or legislative history of Section 1161 which even remotely suggests that Congress intended a departure from this fundamental principle. On the contrary, the principle would clearly seem to be confirmed by the statute. Yet the courts below completely ignored, and thus in effect refuted, that principle.

The effect of the rulings below in this regard brings into sharp focus the facts of this case and the consequent compelling interest of the Petitioners and all other States with Indian lands in regaining the control over non-Indian activity within their boundaries that the decisions below have swept away.

In this case, while the Mescalero Apache Tribe may own and operate the deluxe Inn of the Mountain Gods, the overwhelming majority of the people involved in violating State law with respect to its operation are non-Indians. The vast majority of the patrons of the Inn of the Mountain Gods are non-Indians from across the country. At least half of the employees of the Inn, including the general manager and the bar manager, are non-Indians, and the entire liquor supply of the Inn comes from non-Indian off-reservation wholesalers. The high level of non-Indian involvement with this enterprise is not coincidental. Indeed, non-Indians are invited onto the reservation to do business at the commercial tourist resort of the Mescalero Apache Tribe with the alluring assurance that they need not obey State law within the

[9] The Tenth Circuit commented, without further elucidation, that this case related to "liquor licensing" and therefore did not affect the State's "criminal jurisdiction over the Indians . . ." (App. D, p. 22a). No explanation was given as to how the State could prosecute an alleged criminal violation of its liquor laws without a concommitant power to license, inspect, regulate, investigate, etc. Yet this Court and the Congress have repeatedly noted and decried the crime, violence, bootlegging, graft and corruption that often occur in areas adjacent to liquor outlets. *E.g.*, *California* v. *LaRue*, 409 U.S. 109, 114-119 (1972) (see also concurring opinion of Mr. Justice Stewart, *id.* at 119); *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376; *State Legal Jurisdiction in Indian Country*, *supra*; see also generally *United States* v. *Mazurie*, *supra*.

reservation. A concerted effort is made on the part of the Mescalero Apache Tribe to use its status in an attempt to immunize non-Indians from the requirements of State law and thus gain a competitive advantage in the operation of their tribal commercial facilities. The resort uses its nonlicensed sale of liquor to draw business away from off-reservation establishments that must conform to strict State liquor law requirements, and to aid in its competition in other areas as well, such as boating, golf, tennis, swimming, trap shooting, horseback riding, paddle tennis, food service, convention facilities and nearby skiing. The commercial hunting and fishing business, operated in conjunction with the Inn, is another enterprise of the tribe in which competitive advantage is sought with the assurance to sportsmen that bag limits, season dates, restrictions on taking particular species and various other State law limitations do not apply within the reservation.

The resort is intended to compete directly with non-Indian resorts, and, as a result of the patronage of non-Indians lured to the reservation with tribal assurance of freedom from State law, it does so on a highly successful and profitable basis. It is a nationally and internationally competitive tourist attraction.[10]

We submit that this non-Indian involvement in these tribal commercial activities was never intended by Congress to be exempted under 18 U.S.C. § 1161 or any other statutory or constitutional provision. While Congress has historically attempted to protect Indian tribes within their own territory, going about their own internal affairs, Congress never intended that Indian tribes

[10] These commercial enterprises are not the only cause for alarm over the decisions below. Many other States with Indian lands will be concerned due to the large non-Indian populations residing in Indian country. See, for example, *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978).

be allowed to use establishments on Indian lands, not subject to normal license requirements, as a ruse to attract non-Indians onto Indian land and to protect them from State law for the commercial advantage of the tribe. See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976). Moreover, Congress has never extended protection from State law to non-Indians who venture onto Indian land to engage in commercial business activity with the tribe. Thus, in *Thomas* v. *Gay*, 169 U.S. 264 (1898), a State was allowed to tax non-Indian owned cattle grazing on Indian reservations, and, in *Moe* v. *Confederated Salish & Kootenai Tribes*, *supra*, a State was permitted to impose its cigarette sales tax on cigarettes sold to non-Indians at a commercial Indian enterprise on an Indian reservation. And see *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342 (1949).

The Mescalero Apache tribal ordinance pertaining to the introduction, possession and sale of liquor on the Mescalero Apache Reservation (App. F, pp. 24a-25a) does not contain any regulatory provisions controlling liquor traffic on the reservation. Even if it did, such regulations could not be enforced against non-Indians. *Oliphant* v. *Suquamish Indian Tribe*, *supra*. Nor does federal law contain any regulatory provisions controlling liquor transactions within Indian country. Consequently, if the decisions below stand, ". . . it is clear that wholesale violations of the law by . . . [non-Indian employees and patrons of the Inn] will go virtually unchecked," *Moe* v. *Confederated Salish & Kootenai Tribes*, *supra*, 425 U.S. at 482, unless, of course, the United States Attorney is willing to take on the responsibility of the State Liquor Director. In this case, the decisions below have sanctioned, in addition, even off-reservation violations of State law by non-Indian liquor suppliers of the Inn of the Mountain Gods. Liquor which is imported or transported into the State of New Mexico for delivery or

use therein in the normal course of business is sold to unlicensed Indian facilities in clear violation of State law (App. I, pp. 34a-35a) and, thus, of the Twenty-First Amendment to the United States Constitution (App. J, p. 48a).

Just as a State, when it engages in the ordinary private business of selling liquor, becomes subject to the taxing power of the federal government, *South Carolina* v. *United States*, 199 U.S. 473 (1905), so an Indian tribe, when it becomes a private entrepreneur doing business with the off-reservation world, subjects itself to the powers of the State licensing authority. The tourist resort complex principally involved in this case and every development like it on any Indian reservation in the United States make a mockery of the special treatment and exemptions carved out for Indians by the Congress throughout our history. These are Indians competing directly with non-Indians on a discriminatory basis in the general marketplace. Yet, under the opinions below, the State would be powerless to protect either itself and its own strict standards and procedures, or its citizens subject to this discriminatory competition. We submit that this could not, and never was, the intent of Congress in passing 18 U.S.C. § 1161.[11]

Finally, it should be noted that the position of the United States in this case is rather curious. In this litigation, the United States has argued that the State of New Mexico may not enforce the criminal provisions of its liquor laws against non-Indians on the Mescalero Apache Reservation. Ironically, however, in the case of *Mescalero Apache Tribe* v. *Bell*, United States District Court for the District of New Mexico, No. CIV-78-926C, in which the Mescalero Apache Tribe is seeking to require

[11] Even if the statute could possibly be interpreted to allow such conduct, it would violate the Twenty-First Amendment to the extent described in the text above.

the United States to enforce the New Mexico Motor Vehicle Code against non-Indians operating vehicles on the Mescalero Apache Reservation, the United States has taken the position that enforcement of the State Motor Vehicle Code is within the exclusive jurisdiction of the State of New Mexico when an offense is committed by a non-Indian within the reservation (App. K, pp. 61a-62a). This position is based upon a Memorandum dated March 21, 1979, from the Office of Legal Counsel to Deputy Attorney General Benjamin R. Civiletti in which the Department of Justice takes the position that the prosecution of all crimes and offenses in which there is not a plainly identifiable "victim," as in the case of most traffic offenses and liquor code violations, is within the exclusive jurisdiction of the States when the crime or offense is committed on Indian land by a non-Indian (App. K, pp. 61a-62a). Moreover, it is the opinion of the Department of Justice that where there is an identifiable Indian victim, or where the conduct in question poses an immediate and direct threat to Indian persons, property, or to specific tribal community interests, the jurisdiction of the State and federal governments in these cases is concurrent (App. K, pp. 61a-62a). These conclusions are based on the *McBratney* doctrine.

The only difference between the situation in *Mescalero Apache Tribe* v. *Bell* and this case is that, in this case, a federal statute supports, indeed mandates here, the position taken there.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1731

STATE OF NEW MEXICO, AND JAMES R. BACA, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA Plaintiff	)	
vs	)	CIVIL NO. 75-602-P
STATE OF NEW MEXICO and CARLOS L. JARAMILLO, Director Department of Alcoholic Beverage Control Defendants	)	

JUDGMENT

The United States of America has requested this Court to render a declaratory judgment that the Mescalero Apache Tribe has sole authority to regulate the licensing of tribal outlets located within the exterior boundaries of the Mescalero Apache Reservation and to regulate the sale of alcoholic beverages by these outlets. The Court has also been requested to grant appropriate injunctive relief. The Court having considered the stipulated facts submitted by the parties, the court record of the hearing on the preliminary injunction, and the legal arguments and briefs of the parties, and having made its findings of fact and conclusions of law;

IT IS THE JUDGMENT OF THIS COURT that as between the State of New Mexico and the Mescalero Apache Tribe, 18 U.S.C. 1161 delegates to the Mescalero Apache Tribe the sole authority to regulate the licensing of tribally operated outlets within the exterior boundaries of its reservation and to regulate the sale of alcoholic beverages by those outlets.

Therefore, the Mescalero Apache Tribe need not comply with any state liquor license requirements, nor may any officer or agents of the State of New Mexico enter upon the Mescalero Apache Reservation to enforce state laws concerning licensing and regulation of liquor sales against the liquor outlets owned by the Mescalero Apache Tribe within the outer boundaries of the Reservation, nor may they take any action against wholesale suppliers that would result in the cessation of liquor sales within the Reservation at tribally operated outlets.

IT IS FURTHER ORDERED that defendants and all those persons acting under their control or in concert with them are permanently enjoined from taking any action against the Mescalero Apache Tribe or its suppliers that would result in the cessation of liquor sales by the Tribe at any Tribal owned outlet within the outer boundaries of the reservation; and defendants and all those persons acting under their control or in concert with them are permanently enjoined from ordering state law enforcement personnel to enforce state laws concerning licensing and regulation of liquor sales against the liquor outlets owned by the Mescalero Apache Tribe within the outer boundaries of the Reservation.

s/ H. Vearle Payne
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 75-602 Civil
STATE OF NEW MEXICO and CARLOS L. JARAMILLO, Director, Department of Alcoholic Beverage Control, Defendants.	)	

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following shall constitute the Findings of Fact and Conclusions of Law of the Court:

FINDINGS OF FACT

1. The Mescalero Apache Tribe was recognized by the United States Government in the Treaty of July 1, 1852, 10 Stat. 979 between the United States and representatives of the Mescalero Apache Nation.

2. Article 1 of this Treaty places the Mescalero Apache Nation "exclusively under the laws, jurisdiction and government of the United States of America."

3. The Mescalero Apache Indian Reservation was created by a series of eight executive orders dating from May 23, 1873, to February 17, 1912. Substantially all of the lands within the present outer boundaries of the reservation are held in trust by the United States for the Mescalero Apache Tribe.

4. The Mescalero Apache Tribe has a constitutional government organized pursuant to 25 U.S.C. Section 476, and the government exercises full traditional powers of tribal self-government over the entire Reservation excepting the control surrendered to the United States as trustee.

5. The Mescalero Apache Tribe has adopted an Ordinance published in 30 Fed. Reg. 3553 (March 17, 1965) pertaining to the sale and consumption of alcoholic beverages within the exterior boundaries of the Mescalero Apache Reservation.

6. 18 U.S.C. Section 1161 makes the Federal Indian liquor laws inapplicable to:

> ". . . any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the state in which such act or transaction occurs, and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

7. The Mescalero Apache Tribe has owned and operated a tribal bar in the community of Mescalero for a period of ten (10) years without a state license to do so.

8. On April 2, 1965, Mr. H. E. Babcock, Jr., as Chief of the New Mexico Division of Liquor Control stated in a letter to the Mescalero Apache Tribe's Counsel that an Indian tribe could establish its own liquor operation on reservation land without coming under the Liquor Division's control.

9. Alcoholic beverages are presently being sold at the Inn of the Mountain Gods resort complex and the tribal bar at Mescalero without a state license, without a tribal license and without any other type of license authorizing liquor sales.

10. Under the Ordinance referred to in paragraph 5 above the Mescalero Apache Tribe is not required to obtain a liquor

license in order to sell intoxicating beverages within the exterior boundaries of the Reservation.

11. Alcoholic beverages have been sold at the Inn of the Mountain Gods since July, 1975.

12. The Inn of the Mountain Gods, the tribal bar located in the Village of Mescalero, and the New Mexico licensed bar owned by the Tribe at Apache Summit are all located within the exterior boundaries of the Mescalero Apache Reservation.

13. The enterprise at the Inn of the Mountain Gods which is owned and operated by the Mescalero Apache Tribe was constructed and opened after a feasibility study was made by the Bureau of Indian Affairs.

14. The revenue from the Inn of the Mountain Gods is being used and will continue to be used for the education, social and economic welfare and governmental needs of the Mescalero Apache people.

15. The Inn of the Mountain Gods enterprise is owned and operated by the Tribe according to tribal authority granted under Article XI of the Mescalero Apache Tribal Constitution.

16. Plans and specifications for the construction of the Inn of the Mountain Gods were approved by the Federal Government.

17. The approval of the Bureau of Indian Affairs is required for the budget for each fiscal year for operation of the Inn of the Mountain Gods.

18. The Mescalero Apache Tribe maintains a full staff of eight persons available to enforce tribal ordinances who are not commissioned New Mexico peace officers.

19. The Federal Government has six full-time and two part-time (averaging a total of forty hours per week) officers on the Mescalero Apache Reservation for enforcement of

Federal Law who are not commissioned New Mexico peace officers.

20. Because of state quota restrictions, it would cost in excess of $50,000.00 to purchase a license for use at the Inn of the Mountain Gods, and this would constitute a financial burden on the Mescalero Apache Tribe.

21. The State of New Mexico has never taken steps under 25 U.S.C. Sections 1321 and 1322 or Public Law 280 to assume civil or criminal jurisdiction over the Mescalero Apache Reservation and could not now do so without the consent of the Mescalero Apache Tribe.

22. The State of New Mexico has in the past ordered all wholesalers in the State of New Mexico to cease delivery to the Tribal bars and has threatened to do so in the future.

23. The State of New Mexico has threatened to send its law enforcement personnel into the Mescalero Reservation to enforce state laws concerning the licensing and regulation of liquor sales.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of this lawsuit.

2. The Mescalero Apache Tribe is a tribe of Indians duly recognized by the Federal Government and said tribe has jurisdiction over the territory of the Mescalero Apache Reservation.

3. The Mescalero Apache Tribe has exercised the option granted it by 18 U.S.C. 1161 to regulate the licensing, sale and distribution of alcoholic beverages within the Mescalero Apache Reservation.

4. 18 U.S.C. 1161 does not require the Mescalero Apache Tribe to meet any state licensing requirements to operate tribal-owned liquor outlets.

5. 18 U.S.C. 1161 does not grant the State of New Mexico jurisdiction to enforce any of its liquor laws within the exterior boundaries of the Mescalero Apache Reservation.

6. The State of New Mexico may not forbid wholesale suppliers of the Mescalero Apache Tribe from selling to tribal-owned outlets.

7. As between the Mescalero Apache Tribe and the State of New Mexico, the Mescalero Apache Tribe has sole jurisdiction for regulating the licensing, sale, possession and distribution of alcoholic beverages at tribal-owned outlets within the exterior boundaries of the Mescalero Apache Reservation.

8. The 21st amendment to the United States Constitution does not give the State of New Mexico jurisdiction to enforce any of its liquor laws within the exterior boundaries of the Mescalero Apache Reservation.

9. The federal government and the Mescalero Apache Tribe have preempted the State of New Mexico from any jurisdiction it might arguably have had to regulate the licensing of tribal-owned liquor outlets and to regulate the sale of alcoholic beverages at such outlets within the exterior boundaries of the Mescalero Apache Reservation.

10. 18 U.S.C. 1161 was designed to further Tribal self-government and imposition of the State's licensing regulations against the Mescalero Apache Tribe or enforcement of state liquor law by the state within the Mescalero Apache Reservation would be an unwarranted interference with tribal self-government.

11. Plaintiff is entitled to a permanent injunction to enjoin the State and its officers and agents from entering upon

the Mescalero Apache Reservation to enforce state laws concerning licensing and regulation of liquor sales against the liquor outlets owned by the Mescalero Apache Tribe within the outer boundaries of the Reservation, and further enjoining them from prohibiting wholesalers from selling to tribal-owned outlets.

12. Article I, Section 8, clause 3 of the United States Constitution gives the sole authority to the Congress of the United States to regulate commerce with the Indian Tribes.

Any requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

s/ H. Vearle Payne
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103

H. VEARLE PAYNE
CHIEF JUDGE

December 17, 1976

[Addressees deleted]

RE: USA v. State of New Mexico
No. 75-602 Civil

Dear Counsel:

I have carefully examined the file in the above styled case, the ordinance, all of the briefs and also I have read many cases.

At first I thought I would write an opinion in this case but the pressure of time constrains me to just write a letter.

The question is with relation to the meaning of 18 USC 1161 and particularly the phrase which reads as follows: "provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country." (emphasis added)

I would refer the parties to the recent cases of *Moe, Sheriff et al v. Confederated Salish Kootenai Tribes of Flathead Reservation et al,* on which I have the advanced sheet but which is best cited as 44 L.W. 4535 (4-27-76) and the case which came from New Mexico namely *Morton, Secretary of Interior, et al v Mancari, et al.,* 415 U.S. 535 (1974).

The question before the Court is what is the meaning of the phrase "in conformity both with the laws of the state etc." As I understand it the State is contending that they would

require the Indians to have a liquor license before they could operate and would mean that the State had jurisdiction over the reservation to that extent. An analogous question was passed upon in the *Moe* case *supra,* in which the Court held that the State of Montana could not require the Indian tribes to buy a cigarette dispensing license.

The *Mancari* case *supra,* held that a classification by Congress which was reasonable and rationally designed to further Indian self-government was not unconstitutional.

The Court does not construe the phrase mentioned above to require the Indian tribe to buy a liquor dealers license. The tribe has passed an ordinance that "such introduction, sale and possession" must be "in conformity with the laws of the State of New Mexico." 30 F.R. 3553 (1965). The Court does not construe either the statute nor the ordinance to mean that an Indian reservation is required to secure a dispensers license before it can operate.

The Indian history of Indian law indicates that the reservation is to be free from any licenses of any kind imposed by the State.

Judgment should be entered accordingly.

Do the parties want findings of fact or will the stipulated facts suffice? Will the parties please prepare, if they so desire, any findings of fact and will the prevailing party please prepare and present to the Court a judgment carrying out the provisions of this letter within twenty days.

I will place a copy of this letter in the file so that any one interested may know my reasoning.

Sincerely,

s/ H. Vearle Payne
H. Vearle Payne
U. S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM – December 18, 1978

Before Honorable Oliver Seth, Chief Judge, Honorable William E. Doyle, Circuit Judge, and Honorable Arthur J. Stanley, Jr., District Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. STATE OF NEW MEXICO and CARLOS L. JARAMILLO, Director, Department of Alcoholic Beverage Control, Defendants-Appellants, ALL INDIAN PUEBLO COUNCIL, INC., Amicus Curiae-Appellee.	JUDGMENT No. 77-1309 (D.C. No. 75-602-P)

This cause came on to be heard on the record on appeal from the United States District Court for the _____ District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1309

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	Appeal from the United States District Court for the District of New Mexico (D.C. No. 75-602-P)
THE STATE OF NEW MEXICO, and CARLOS L. JARAMILLO, Director, Department of Alcoholic Beverage Control, Defendants-Appellants.	)	

Before SETH, Chief Judge, DOYLE, Circuit Judge, and STANLEY,* Senior District Judge.

DOYLE, Circuit Judge.

This is an appeal by the State of New Mexico from a declaratory judgment entered by the United States District Court for the District of New Mexico, January 31, 1977. In essence it ruled that the Mescalero Apache Tribe was not subject to the liquor licensing authority of the State of New Mexico with respect to liquor outlets located within the exterior boundaries of the Mescalero Apache Reservation. New Mexico contends that it is authorized to license and thus control the liquor traffic on the Reservation. The action is alleged to have arisen pursuant to 28 U.S.C. § 1345 together with Rule 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201, 2202. No substantial dispute exists as to the facts. There were

* Of the District of Kansas, sitting by designation.

stipulations as to most of these, and they are set forth in the findings, conclusions and judgment of the trial court.

The Mescalero Indian Tribe was formally placed under the control of the government in the Treaty of July 1, 1852, between the United States and representatives of the Mescalero Apache Tribe. Under the terms of this Treaty, the Tribe is exclusively subject to the laws, jurisdiction and government of the United States of America. Its lands are held in trust by the United States for the benefit of the Mescalero Apache Tribe. The Tribe has a government which has been created under 25 U.S.C. § 476. Under the terms of the Treaty the tribal government exercises full sovereign powers within the boundaries of the Reservation, except for the control surrendered by it to the United States as trustee. The Tribe has adopted an ordinance (published in 30 Fed. Reg. 3553), pertaining to the sale and consumption of alcoholic beverages within the exterior boundaries of the Mescalero Indian Reservation. 18 U.S.C. § 1161 was found by the court to render the federal statutes, which previously had prohibited the sale and use of liquor by the Indians, not applicable to "any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the state in which such act or transaction occurs, and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

The Tribe has actually operated a bar in the community of Mescalero for 10 years without having any state license to do so.

On April 2, 1965, the Chief of the New Mexico Division of Liquor Control acknowledged in a letter to the Mescalero Tribe's council that an Indian tribe could establish its own liquor operation on reservation land without being subject to the control of the New Mexico Liquor Division.

Liquor is now being sold in the Inn of the Mountain Gods, a large resort complex, and at the tribal bar at Mescalero without a state license, without a tribal license and without any other kind of license authorizing liquor sales.

The trial court ruled that under the tribal ordinance, 30 Fed. Reg. 3553, the Tribe was not required to obtain a liquor license from the state in order to sell intoxicating beverages within the boundaries of the Reservation. Since July 1975, the beverages have been sold at the Inn of the Mountain Gods. That institution, together with the tribal bar in Mescalero and the bar at Apache Summit, which is licensed by New Mexico, are all located within the exterior boundaries of the Mescalero Apache Reservation. The Inn of the Mountain Gods is owned by the Tribe and is operated for the benefit of its education, social and economic welfare program on behalf of the people of the Mescalero Apache Tribe. The budget of the Inn is submitted for approval to the Bureau of Indian Affairs. Tribal ordinances are enforced on the premises of the Inn by those on the staff. Also, the federal government maintains six officers on the Mescalero Reservation for enforcement of federal law.

The trial court also found that due to state quota restrictions the cost of purchase of a license (for use at the Inn) would be $50,000. It was recognized by the court that this would place a financial burden on the Tribe.

The trial court found, in addition, that New Mexico had never sought to assert civil or criminal jurisdiction over the Mescalero Apache Reservation. The present action was precipitated as a result of New Mexico ordering all wholesalers in the State to cease delivery to the tribal bars and by the threat of New Mexico to send its law enforcement personnel into the Reservation to enforce state laws concerning the liquor traffic. The court concluded that as between the Mescalero Tribe and the State of New Mexico, the Tribe had sole jurisdiction over

the licensing of tribal-owned liquor outlets and had sole authority to regulate the sale of alcoholic beverages at those outlets within the exterior boundaries of the Mescalero Apache Reservation.

Based upon the trial court's ruling that the State of New Mexico lacked authority to regulate liquor traffic on the Reservation, it permanently enjoined the State and its officers and agents from entering on the Reservation to enforce state laws concerning licensing and regulation of liquor sales owned by the Mescalero Apache Tribe within the boundaries of the Reservation and enjoining the State and its officers from prohibiting wholesalers from selling liquor to tribal-owned outlets.

Questions which the State tendered are the following:

First, whether by reason of 18 U.S.C. § 1161 and the Act of August 15, 1953, 67 Stat. 586, the laws of the State of New Mexico with respect to the licensing and regulation of the possession, sale, service and consumption of alcoholic beverages apply to tribally-owned and operated facilities within the exterior boundaries of the Mescalero Apache Indian Reservation.

The second question is a slightly different version of the same question. It is whether the State of New Mexico is authorized by the laws of the United States to enforce its laws pertaining to licensing and regulation of the possession, sale, service and consumption of alcoholic beverages on tribally-owned and operated facilities within the exterior boundaries of the Mescalero Apache Indian Reservation.

Third, (this is also a replica) whether the injunction entered by the district court prohibiting the State of New Mexico from enforcing its laws with respect to liquor licensing and regulation is valid and should be upheld.

The Act of Congress on which New Mexico relies is 18 U.S.C. § 1161. In essence it provides that the liquor prohibitions in the

prior federal statutes, §§ 1154, 1156, 3113, 3488 and 3618 do not apply within an area that is outside Indian country nor to any act or transaction within Indian country provided that it is "in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction . . . , certified by the Secretary of the Interior."

The State's position, therefore, depends on its obtaining a construction of § 1161, *supra,* which finds that the words "in conformity with the laws of the state" are tantamount to saying that the licensing authority is granted to the state, so our principal inquiry is whether this clause was designed to grant licensing and regulation of liquor on tribal lands to the State of New Mexico. We conclude that no such meaning can be attributed to § 1161, *supra,* and that the trial court's judgment in this regard is to be affirmed.

I

The boundaries of Indian country and of the Mescalero Tribe are the same. *See United States v. Mazurie,* 419 U.S. 544 (1975).

The decision of the Supreme Court in *United States v. Mazurie, supra,* is a leading one which virtually decides the present question. The conflict in that case was not between the tribe and the state, however. It was between the Wind River Tribes and an individual bar or tavern owner, who operated his business within an unincorporated village inside the Wind River Reservation. Following the enactment of § 1161, *supra,* the Tribe had passed an ordinance in conformity with it and had denied a tribal license to the bar, which was held to be located in Indian country. Mazurie, the bar owner, filed an action in federal district court seeking to compel the issuance of a license.

The district court held that the location of the bar was within the tribal boundaries and, considering the composition of the residents, was located within Indian country, whereby § 1161, *supra,* applied. This court, however, reversed the district court's ruling on the basis that the prosecution had not met its burden of proving that the bar was within Indian country. The decision also questioned whether Congress could delegate such authority to an Indian tribe.

The Supreme Court set this straight by reversing and holding that § 1161, *supra,* was not vague; that the bar's location rendered it subject to tribal regulation; that the fact of ownership in fee of the land was not significant; that Congress still had the authority to delegate such regulatory power to a tribal council.

It is true that the question of state regulation was not considered, but there was no doubt or exception expressed concerning the authority of Congress to delegate this power to the tribe. The Court cited with approval from one of its early decisions, *Perrin v. United States,* 232 U.S. 478, 482 (1914), as follows:

> "The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' and in part from the recognized relation of tribal Indians to the Federal Government." 232 U.S., at 482.

Perrin was a pre-§ 1161 decision, but it attests to the scope and extent of the power of Congress to regulate in this area.

The Supreme Court reasoned that while there are limitations on the extent to which Congress can delegate its powers, these limitations are less restrictive when the delegation is to an independent governmental unit. When an entity has sovereignty of its own, Congress' power of delegation to it is likely to be valid.

Another decision of the Supreme Court, that of *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965), contrasts the standard in § 1161, *supra,* with laws delegating authority to the state in other areas. In the latter the intent to empower state exercise of authority over reservations is required to be very clear. If agents of a state are to be permitted to enter tribal land, the authority from Congress or the Secretary of the Interior must be plain. In that case the operator of a retail trading post on the Navajo Indian Reservation had been licensed by the Commissioner of Indian affairs. The trading post challenged the right of Arizona to levy a tax on its income derived from trading with reservation Indians. The Supreme Court in denying the authority of the state to levy such a tax reasoned that the powers of the federal government over the tribal lands resulted in relieving the state of any duties which it otherwise might have to provide protection, etc., and thus it could not justify levying a tax on income derived from trading on the reservation. To allow the state to do so would permit them to put a burden on the traders or the Indians. The Court said:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. * * * 380 U.S. at 690.

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), involved an attempt by Arizona to impose a tax on the

income of Navajo Indians residing on the reservation and whose income was derived wholly from reservation sources. Arizona was held to lack jurisdiction. The governing principles were that the policy relieving Indians from state jurisdiction and control is deeply rooted in the nation's history, having first been set forth in the opinion of Chief Justice Marshall, which recognized that Indian nations were distinct political communities, having territorial boundaries in which their authority is exclusive and having a right to the lands within those boundaries which is acknowledged and guaranteed by the United States. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832).

The concept of Indian sovereignty was said to be important (in *McClanahan*), not necessarily because it resolves the issues, but because it provides a background for reading the applicable treaties and statutes. The background shows the tribes to have been independent and sovereign nations, and even though the Navajos who were involved in the *McClanahan* case did not have an express guarantee of freedom or exemption from state taxes in its treaty, the concept of sovereignty nevertheless precludes efforts by the state to tax Indians on the reservation. The case points out that when Arizona entered the union its entry was conditioned on the right and title to Indian lands remaining subject to the disposition of and under the control of Congress.

More recently, in *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463 (1976), the Supreme Court ruled that Montana was precluded from levying cigarette sales taxes, personal property taxes and issuing vendor's licenses to sell cigarettes on the Indian reservation to Indians. The Court spoke out for uniform rules and not checkerboard enforcement. Those proposals were said to "conflict with the congressional statutes which provide the basis for decision with respect to such impositions. *McClanahan, supra; Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973)." 425 U.S. at 480-81.

In an even more recent case, that of *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Supreme Court again emphasized the need for Congress to explicitly grant power to the state in order for the latter to exercise regulatory power in Indian country. It said that this could not be left to inference. Here Congress had granted jurisdiction over civil causes of action or causes to which Indians were parties to state courts to the same extent that the states had jurisdiction over civil causes of action. The question was whether this allowed the state to exercise regulatory power in Indian country. The Supreme Court said no, because the Act had not explicitly granted such power. Congress, it is said, had not intended to have jurisdiction inferred, and so the only grant was to hear cases.

In summary, the cases stress that regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms. Section 1161, *supra,* does not delegate this authority either expressly or impliedly.

The legal basis of this is the authority of Congress to regulate commerce with the Indian tribes under the United States Constitution art. I, § 8, cl. 3. Under this Congress is empowered to prohibit or regulate (1) the sale of alcoholic beverages to tribal Indians, and (2) the introduction of alcoholic beverages into Indian country. *United States v. Mazurie, supra.*

Until 1953, Congress prohibited altogether the sale and use of alcoholic beverages by the Indians. Section 1161, *supra,* was enacted in 1953 so as to eliminate this federally imposed prohibition on liquor dealings with the Indians. S. Rep. No. 722, 83d Cong., 1st Sess, *reprinted in* (1953) U.S. Code Cong. & Ad. News 2399-2400. The legislation was intended also to end discrimination against the Indians in areas where they were treated differently from non-Indians. *Id.* at 2400. Although

the statute ended federal liquor prohibition, it consented to tribal prohibition if it was desired by the tribe.

In sum:

The cases deal with the scope and the extent of government power over the Indian tribes and lack of state authority in this area. We cannot perceive any semblance of support for the State's position that Congress intended to empower it to regulate the liquor traffic on Indian reservations. So if there is any ambiguity in the statute, the cases dispel it.

II.

We have read the arguments of the State of New Mexico which seek to present legislative history material, but these fail to evidence the kind of intent and purpose which New Mexico seeks to establish.

In addition to legislative history, the State's brief cites statutory provisions which deal with other more or less related subjects in an effort to provide support for their argument that these somehow confer jurisdiction on the state to police liquor problems and therefore to license the liquor trade on Indian reservations. We disagree with these arguments, and we here are not going to deal with what has been said beyond showing some examples which illustrate the remoteness of their contentions.

Their legislative history arguments are particularly remote. They cite Representative Patten of New Mexico and a statement made by him during the early stages of the consideration by Congress of what later became § 1161. His remarks primarily deal with the removal of the prohibition of liquor as to the Indians.

An argument is made in respect to Public Law 277. In the New Mexico Enabling Act, New Mexico agreed to provide in

the state constitution that liquor sales to Indians were prohibited. In 1953, express authority was given to New Mexico to amend its constitution. P. L. 277 (67 Stat. 586). The argument is that the repealing impliedly granted the state jurisdiction over liquor. No such implied grant is apparent.

The consent given by the federal government to states provided for in 25 U.S.C. §§ 1321, 1322 is relied on. This pertains to the consent by the government to a state assuming criminal and civil jurisdiction. The exercise of this jurisdiction must, however, be with the consent of the Indian tribe under § 1321. This includes the civil jurisdiction. Section 1322 provides that this is exercisable only with the consent of the tribe under § 1322.

Apprehension is expressed by New Mexico that it will lose all criminal jurisdiction over the Indians by an unfavorable decision on this liquor licensing issue. Not so. This case is limited to liquor licensing.

New Mexico further argues that the Indians will next have gambling. This issue is obviously not before us.

Nor does the Twenty-First Amendment permit state liquor licensing. We see nothing in that provision which authorizes the states to regulate liquor licensing for the Indians.

New Mexico cannot derive any aid and assistance from the taxing cases. *See Warren Trading Post v. Arizona Tax Commission, supra,* and *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). This latter does not deal with taxing income or property on the reservation.

The collateral sources cited by the state are not more persuasive than the direct arguments which are made.

Our conclusion is that the judgment of the trial court must be affirmed. It is so ordered.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-788

NEW MEXICO, ET AL.,

Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner [sic],

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 17, 19 79.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 12th day of March, 19 79.

APPENDIX F

MESCALERO APACHE TRIBAL ORDINANCE NO. 15, LEGALIZING THE INTRODUCTION, SALE AND POSSESSION OF INTOXICANTS, 30 Fed. Reg. 3553 (1965).

Ordinance Legalizing the Introduction, Sale and Possession of Intoxicants

Pursuant to the Act of August 15, 1953 (Public Law 277, 83d Congress, 67 Stat. 586), I certify that the following Ordinance No. 15 relating to the application of the Federal Indian liquor laws on the Mescalero Reservation was duly enacted on January 9, 1965, by the Tribal Business Committee of the Mescalero Apache Tribe which has jurisdiction over the area of Indian country included in the ordinance:

Pursuant to the Act of August 15, 1953 (Pub. Law 277, 83d Cong., 1st sess., 67 Stat. 586), an Indian Tribe having appropriate jurisdiction is empowered to make an ordinance legalizing the introduction, sale and possession of intoxicating beverages within any area of Indian country coming within the jurisdiction of such Tribe, and

Whereas, at an election held on the 18th day of December 1964, the majority of voters of the Mescalero Apache Tribe indicated approval of repeal of the Federal Indian Liquor Laws to any act or transaction within the Mescalero Apache Reservation, and did further assent to the legalizing of the introduction, sale and possession of intoxicants within the Mescalero Apache Reservation.

Now, therefore, be it resolved and ordained by the Mescalero Tribal Business Committee as follows:

1. That the introduction, sale and possession of intoxicating beverages shall be lawful within the Indian country under the jurisdiction of the Mescalero Apache Indian Tribe: *Provided,* That such introduction, sale and possession is in conformity with the laws of the State of New Mexico: *Provided further,* That the sale of intoxicating beverages upon the Mescalero Apache Reservation by any person other than the Mescalero Apache Indian Tribe shall be pursuant to license issued by the Mescalero Apache Tribe.

2. That any Tribal laws, resolutions or ordinances heretofore enacted which prohibit the sale, introduction and possession of intoxicating beverages within the Mescalero Apache Reservation are hereby repealed.

3. That this ordinance shall be effective upon its certification by the Secretary of the Interior and its publication in the FEDERAL REGISTER.

Dated: March 11, 1965.

John A. Carver, Jr.,
Under Secretary of the Interior

[F.R. Doc. 65-2694; Filed, Mar. 16, 1965; 8:46 a.m.]

APPENDIX G

STATE OF NEW MEXICO
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
STATE CAPITOL
SANTA FE, NEW MEXICO

September 17, 1975

Mr. Wendell Chino, President
Mescalero Tribe
Mescalero, New Mexico 88340

Dear Mr. Chino:

We have been advised by the Office of the Attorney General of the State of New Mexico that it appears as though the decision in *United States v. Mazurie*, ____U.S.____, 95 S. Ct. 710, 42 L.Ed2d 706, overrules this department's letter of April 7, 1965, by Mr. Howard Babcock to you.

The letter by Mr. Babcock advised that: ". . .an Indian Tribe could establish their own liquor operation on reservation land without coming under the control of this division."

Please find enclosed also a copy of the 'Ordinance Legalizing the Introduction, Sale and Possession of Intoxicants' which was apparently promulgated by the Tribal Business Committee of the Mescalero Apache Tribe.

It seems that the tribe, either voluntarily or under some set of congressional conditions, did approve of repeal of the Federal Indian Liquor Laws to any act or transaction within the Mescalero Apache Reservation and did assent to the legalizing of the introduction, sale, and possession of intoxicants within the Mescalero Apache Reservation.

Resolution No. 1 (one) provides: "That the introduction, sale and possession of intoxicating beverages shall be lawful within

the Indian country under the jurisdiction of the Mescalero Apache Indian Tribe: **PROVIDED**, that such introduction, sale and possession is in conformity with the laws of the State of New Mexico: . . . ."

It would seem clear that the letter from Mr. Babcock is erroneous in its instruction or advise (sic) and must thus be rendered without effect.

Please be informed that we feel the sale, service, or the permitting of consumption of alcoholic beverages or intoxicants at the Inn of the Mountain Gods is in direct violation of the Ordinance and of the New Mexico statutes.

You are thus ordered to cease all sale, service, possession or the permitting of consumption of alcoholic liquors and intoxicants at the Inn of the Mountain Gods as of the fifteenth of October, 1975, until it has been clearly determined under what conditions the sale, service, consumption, or possession may be allowed.

Yours truly,

s/ Carlos L. Jaramillo

CARLOS L. JARAMILLO
Director

APPENDIX H

Excerpt from

5 AMERICAN INDIAN LAW REV. 224-227 (1977).

Source: Volumes 18-39, *Federal Register* (1953-1974)

Table 2. Tribal Laws Dealing with Legal Alcohol 1953-1974: By Reservation, Sale, Introduction and/or Possession, Tribal License System, Year Legalized, "On" and/or "Off" Specified, and Tribal Sales

Tribe or Reservation (State)	Year Legal	Laws Specify: Introduction and/or Possession	Legal Sale	Tribal License	By Drink	Package	Tribal Tax	Tribe to Sell
1. Klamath Tribe (ORE)	1953	X	X					
2. Fort Belknap (MT)	1953	X						
3. Cheyenne River Sioux (SD)	1953	X	X	X				
4. Confederated Colville Tribes (WA)	1953	X	X					
5. Minnesota Chippewa Tribe (Consol. Chip. Agency)	1953	X	X					
6. Agua Caliente (Palm Springs) Mission Ind. (CA)	1953	X	X					
7. Standing Rock Sioux Tribe (SD and ND)	1953	X	X					
8. Bad River Chippewa Tribe, Lake Superior (WIS)	1954	X	X					
9. Guidiville Pomo Tribe (CA)	1954	X	X					
10. Blackfeet Tribe (MT)	1954	X	X	X				
11. Prairie Island Ind. Res. (MINN)	1954	X	X					
12. Tule River Tribe (CA)	1954	X	X					
13. Chippewa-Cree of Rocky Boy Res. (MT)	1954	X						
14. Red Cliff Chippewa Band (WIS)	1954	X	X	X				
15. Lower Brule Sioux Tribe (SD)	1954	X	X	X				
16. Lower Sioux Ind. Com. (MINN).	1954	X	X					
17. Graton Reservation (CA)	1954	X	X					
18. Colorado River Tribes (CA)	1954	X	X					
19. Quileute Tribe of Washington	1954	X	X					

Table 2. Tribal Laws Dealing with Legal Alcohol 1953-1974 (continued)

Tribe or Reservation (State)	Year Legal	Laws Specify: Introduction and/or Possession	Legal Sale	Tribal License	By Drink	Package	Tribal Tax	Tribe to Sell
20. New Upper Sioux Band of Minn.	1954	X	X					
21. Keweenaw Bay Ind. Com. (MICH)	1954	X	X					
22. Blackfeet Tribe (MT)	1954			X				
23. Walker River Piaute Tribe (NEV)	1955	X	X					
24. Uintah and Ouray Utes (UTAH)	1955	X	X					
25. Spokane Tribe (WASH)	1955	X	X			X		
26. Turtle Mt. Band of Chippewa (ND)	1955	X	X					
27. Minnesota Chippewa Tribe	1955			X			X (15%)	
28. Los Coyotes Mission Indians (CA)	1955	X	X					
29. Affiliated Tribes of Ft. Berthold (ND)	1956	X	X					
30. San Carlos Apache Tribe (AZ)	1957							
31. White Mountain Apache Tribe (AZ)	1957	X	X	X	X	X		
32. Sandia Pueblo (NM)	1958	X	X					
33. Jicarilla Apache Tribe (NM)	1958	X						
34. Menominee Tribe (WIS)	1959	X	X					
35. Tulalip Ind. Res. (WA)	1959	X	X					
36. Pyramid Lake Paiute Res. (NEV.)	1959	X	X	X	X	X		
37. Pala Reservation (CA)	1960	X	X					
38. Sycuan Reservation (CA)	1960	X	X					
39. Blackfeet Res. (MT)	1960			X				
40. Flathead Reservation (MT)	1960	X	X	X	X	X		
41. Colorado River Res. (AZ)	1960	X	X	X				
42. Ft. Belknap Res. (MT)	1961		X	X		X		
43. Jicarilla Apache Res. (NM)	1962	X	X					
44. Cour D'Alene Res. (ID)	1962	X	X					
45. Walker River Paiute Res. (NM) [sic]	1963	X	X	X	X			
46. Crow Creek Sioux Res. (SD)	1963	X	X	X				
47. Port Madison Suquamish Res. (WASH)	1963	X	X					
48. Pojoaque Pueblo (NM)	1963	X	X					
49. Zia Pueblo (NM)	1964	X	X					
50. Walker River Paiute Res. (NEV)	1964	X (sale repealed)						
51. Seminole Tribe (FLA)	1964	X	X	X				
52. Crow Creek Sioux Res.	1965	X	X	X				
53. Bishop Ind. Com. (CA)	1965	X	X					
54. Santa Clara Pueblo (NM)	1965	X	X					
55. Mescalero Apache Res. (NM)	1965	X	X	X				
56. San Carlos Apache Res. (AZ)	1965	X	X	X				

Table 2. Tribal Laws Dealing with Legal Alcohol 1953-1974 (continued)

Tribe or Reservation (State)	Year Legal	Laws Specify: Introduction and/or Possession	Legal Sale	Tribal License	By Drink	Package	Tribal Tax	Tribe to Sell
57. Colorado River Res. (AZ)	1966	X	X	X				
58. Walker River Paiute Res. (NEV)	1966	X	X	X				
59. Cochiti Pueblo (NM)	1966	X	X	X				
60. Lower Brule Sioux Res. (SD)	1966		X (non-Indians allowed to					
61. Swinomish Res. (WA)	1966	X	X	X				sell)
62. Ft. Yuma Res. (AZ & CA)	1967	X	X	X			X	
63. Ft. Belknap Res. (MT)	1967			X	X	X		
64. Rincon Res. (CA)	1967	X	X					
65. Kalispel Res. (WA)	1967	X	X					
66. Swinomish Res. (WA)	1967		X	(Wholesale License Req.)				
67. Campo Res. (CA)	1968	X	X					
68. Barona Res. (CA)	1968	X	X					
69. Vievas (Baron Long) Res. (CA)	1968	X	X					
70. Santa Ynez Res. (CA)	1968	X	X					
71. Santa Rosa Res. (CA)	1968	X	X					
72. Eastern Band of Cherokee (NC)	1969	X	X					
73. Pine Ridge Res. (SD)	1969	X	X	X	X	X		X
74. Hualapai Ind. Res. (CA)	1969	X	X	X				X
75. Pauma Ind. Res. (CA)	1969	X	X					
76. Hoopa Res. (CA)	1969	X	X					
77. Ak-Chin Res. (AZ)	1969	X	X	X				
78. Isleta Pueblo (NM)	1969	X	X					
79. Southern Ute Res. (CO)	1970	X	X	X				
80. Pine Ridge Res. (SD)	1970			X	X	X		
81. Moapa River Res. (NEV)	1970	X						
82. Chippewa Cree Tribe of Rocky Boy Res. (MT)	1970		X	X	X	X		
83. Round Valley Res. (CA)	1970	X	X					
84. Pine Ridge Res. (SD)	1970	(All Legalization [#73 & #80] repealed						
85. Hoopa Valley Res. (CA)	1970	X	X					
86. Tule River Res.	1970	X	X					
87. Chippewa Cree of Rocky Bay Res. (MT)	1971			X	X	X		X
88. Tesuque Pueblo (NM)	1971	X	X					
89. San Manuel Res. (CA)	1971	X	X					
90. Warm Springs Res. (ORE)	1971	X	X					
91. Round Valley Res. (CA)	1971	X	X	X				
92. Ft. McDowell Mohave-Apache Res. (AZ)	1971	X	X	X			X	
93. Chemehuevi Res. (CA)	1971	X	X	X				X

Table 2. Tribal Laws Dealing with Legal Alcohol 1953-1974

Tribe or Reservation (State)	Year Legal	Laws Specify: Introduction and/or Possession	Legal Sale	Tribal License	By Drink	Package	Tribal Tax	Tribe to Sell
94. Lac Courte Oreilles Res. (WIS)	1971	X	X					
95. Rosebud Sioux Res. (SD)	1971	X (see below—Misprint corrected						
96. Nez Perce Res. (IDA)	1971	X	X	X				in #10)
97. Wind River Res. (WYO)	1972	X	X	X				
98. Fallow Paiute Res. (NEV)	1972	X	X	X	X	X		
99. Lummi Res. (WA)	1972	X	X					
100. Lone Pine Res. (CA)	1972	X	X					
101. Torres-Martinez Res. (CA)	1972	X	X					
102. Chemehuevi Res. (CA)	1972	X	X					
103. Salt River Pima-Maricopa Res. (AZ)	1973	X						
104. White Mountain Apache Res. (AZ)	1973	X	X	X	X	X		
105. Rosebud Sioux Res. (SD)	1973	X	X	X	X	X	X	
106. Colorado River Res. (AZ & CA)	1973	X	X					
107. Tulalip Res. (WASH)	1973	X	X	X				
108. Chemehuevi Res. (CA)	1973	(Correction of misprint for #102)						
109. Lac Du Flambeau Res. (WIS)	1973	X	X	X				
110. Yavapai-Prescott Ind. Com. (AZ)	1973	X	X	X			X	
111. Turtle Mountain Res. (ND)	1973	X	X	X				
112. Standing Rock Sioux Tribe (SE & ND)	1973	X	X	X				
113. Hoh Res. (WA)	1973	X	X	X				
114. La Jolla Mission Ind. Res. (CA)	1973	X	X					
115. Manzanita Mission Ind. Res. (CA)	1973	X	X					
TOTALS		104	100	46	13	15	5	12

See continuation of chart, p. 32a.

CONTINUATION OF FOREGOING CHART FROM VOLUME 40 THROUGH VOLUME 44, NUMBERS 1–41, *FEDERAL REGISTER* (1975 to February 1979) PREPARED BY PETITIONERS.

Tribe or Reservation (State)	Year Legal	Introduction and/or Possession	Laws Specify: Legal Sale	Tribal License	By Drink	Package	Tribal Tax	Tribe to Sell
116. Chippewa Tribal Res. (MINN)	1975	X	X					
117. Fort Belknap Res. (MONT)	1975	X	X	X	X	X		X
118. Washoe Tribe (NEV & CA)	1976	X	X		X			
119. Pueblo of San Ildefonso (NM)	1976	X	X					
120. Hannahville Indian Res. (MICH)	1976	X	X					
121. Tulalip Indian Res. (WA)	1977	X	X	X	X	X	X (5%)	
122. Sokaogon Chippewa Community Res. (WIS)	1977	X	X	X				X
123. Gila River Indian Community (AZ)	1977	X	X	X	X	X		
124. Fort Independence Indian Res. (CA)	1977	X	X					
125. Fort Mojave Indian Tribe (AZ, NEV & CA)	1978	X	X		X	X		
126. Muckleshoot Indian Res. (WASH)	1978	X	X	X	X	X	X (5%)	X

APPENDIX I

SELECTED PROVISIONS FROM 1978 COMPILATION OF NEW MEXICO STATUTES ANNOTATED (N.M.S.A. 1978 Comp.) DEALING WITH THE REGULATION OF LIQUOR OUTLETS

(1) § 60-7-1 [Liquor policy of state; investigation of applicants.]

It is hereby declared to be the policy of this act that the sale of all alcoholic liquors in the state of New Mexico shall be licensed, regulated and controlled so as to protect the public health, safety and morals of every community in this state; and it is hereby made the responsibility of the chief of division [director of the department of alcoholic beverage control] to investigate into the legal qualifications of all applicants for licenses under this act, and to investigate into the conditions existing in the community wherein are located the premises for which any license is sought, before such license is issued, to the end that licenses shall not be issued to unqualified or disqualified persons or for prohibited places or locations.

(2) § 60-7-2. Dispenser's license.

In any local option district any person who is the proprietor or owner of any hotel or restaurant, as herein defined, or any person qualified under the terms of any ordinance of any municipality or resolution of any board of county commissioners or any other person who is not disqualified by provisions of this act, may apply for, and if found qualified by the licensing authorities whose duty it is to make a finding concerning such qualifications, shall be issued a dispenser's license for the sale of alcoholic liquors. A dispenser's license may be reclassified or converted to a retailer's license upon proper application and

payment of the license fees to the chief of division [director of the department of alcoholic beverage control]. The reclassified or converted license shall not be considered a new or additional license if it is to be used at the same location or if it does not add to the sum total of the licenses of a given area in any computation for the purpose of determining the maximum number of licenses that may be issued.

(3) § 60-7-3. Retailer's license.

In any local option district any person who is the proprietor or owner of any mercantile business, or who shall desire to start or to continue a business for the sale of alcoholic liquors, if found qualified under the provisions of this act by the licensing authorities, whose duty it is to make a finding concerning such qualification, shall be issued a retailer's license for the retail sale of alcoholic liquors. A retailer's license may be reclassified or converted to a dispenser's license upon proper application and payment of the license fees to the chief of division [director of the department of alcoholic beverage control]. The reclassified or converted license shall not be considered a new or additional license if it is to be used at the same location or if it does not add to the sum total of the licenses of a given area in any computation for the purpose of determining the maximum number of licenses that may be issued.

(4) § 60-7-5. Wholesaler's license.

In any city or county any person who is not prohibited from receiving a license by the provisions of this act, upon proper application therefor, accompanied by the proper fees therefor, shall be issued a license as a wholesale dealer in alcoholic liquors. No such wholesaler shall sell, offer for sale or ship, any alcoholic liquors not received at, and shipped from, the premises specified in such wholesale license, except beer as provided in Section 705 [60-7-23 NMSA 1978]; and no

wholesaler shall sell or offer for sale, any alcoholic liquors to any person other than the holder of a New Mexico wholesaler's, retailer's, dispenser's or club license; provided, that nothing contained in this section shall prevent the sale, transportation or shipment by a wholesaler to any person outside of the state of New Mexico when shipped under permit from the division [department of alcoholic beverage control].

(5) § 60-7-17. [Persons prohibited from receiving licenses.]

A. The following classes of persons shall be prohibited from receiving licenses under the provisions of this act:

(1) persons who have been convicted of two separate misdemeanor violations of this act in any calendar year or of any felony, except those persons restored to civil rights;

(2) a person who is not a citizen of the United States;

(3) a person under the age of twenty-one years;

(4) a corporation which is not duly qualified to do business in the state of New Mexico;

(5) a person who is not the real party in interest in the business to be conducted under the license for which application is made.

B. No nonresident distiller, brewer, winer, rectifier or bottler, and no nonresident licensee coming within the provisions of Section 707 (a) [60-7-26 A NMSA 1978] of this act, directly or indirectly, or through an affiliate or subsidiary, shall apply for, be granted or hold a license under the provisions of this act as a New Mexico wholesale liquor dealer, distiller, rectifier, brewer, winer, bottler, dispenser or retailer.

C. It shall be a violation of this act for any person whose license as a retailer or dispenser of alcoholic liquors has been revoked under the provisions of this act to accept or remain

in any employment in or about the retail or dispensary sale of alcoholic liquors gratis or for hire within two years from the date of such revocation of such person's license.

D. It shall be a violation of this act for any retail, dispensary or club licensee knowingly to permit any person whose license as a retailer or dispenser of alcoholic liquors has been revoked under the provisions of this act to engage in or about the sale of alcoholic liquors on behalf of such retail, dispensary or club licensee within two years from the date of such revocation of such person's license.

(6) § 60-7-20. Expiration and renewal of licenses; transfers; additional licenses restricted; appeal from issuance or denial.

A. All licenses provided for in the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-24-7, 60-3-1 to 60-11-4 NMSA 1978] shall expire on June 30 of each year and may be renewed from year to year under the rules and regulations of the division [department of alcoholic beverage control]. The chief of the liquor control division [director of the department of alcoholic beverage control] shall determine whether any of the licensees under his jurisdiction are delinquent in any taxes administered by the bureau of revenue [department of alcoholic beverage control] as of June 1 of each year. The chief [director] shall check his own files to ascertain whether or not there exists any other reason why a license should or might not be renewed. If any impediment to renewal is found, the chief [director] shall, by certified mail, return receipt requested, mailed not later than June 10, notify the licensee of the impediment. Any New Mexico wholesaler, rectifier, winer, wine bottler, retailer, club or dispenser licensee who has received such a notice and who has subsequently satisfied the chief of division [director] that he is not presently liable in the payment of any taxes administered by the bureau of revenue [department], and is otherwise in good standing at the expiration of any license year,

shall be entitled to a new annual state license for the succeeding license year if the licensee is otherwise entitled thereto under the provisions of the Liquor Control Act. At the beginning of any new license year, and throughout the new license year, the chief of division [director] may limit, in his discretion, the number of additional New Mexico wholesaler, rectifier, winer, wine bottler, retailer, club or dispenser licenses to be issued within the state and every political subdivision thereof, and the chief of division [director], in his discretion, may refuse to issue any additional licenses.

B. In determining whether a new or additional license shall be limited or refused, the chief of division [director] shall take into consideration the population of the locality involved, the number of existing licenses in the locality or area and the public health, safety and morals of the political subdivision, area or locality wherein any additional license is sought.

C. Before any license may be transferred to use at a new location, and before any new retailer's or dispenser's license is issued for a location where alcoholic liquors are not now being sold, the chief of division [director] shall cause a notice of the application therefor to be posted conspicuously on a sign not smaller than thirty inches by forty inches on the outside of the front wall or front entrance of the immediate premises for which the liquor license or transfer is sought or, if no building or improvements exist on the premises, the notice shall be posted on the front entrance of the immediate premises for which the license or transfer is sought, on a billboard not smaller than five feet by five feet. The contents of the notice shall be in the form prescribed by the division of liquor control [department of alcoholic beverage control], and such posting shall be over a continuous period of twenty days prior to the issuance of the license or transfer.

* * *

(7) § 60-7-24. [Issuance of licenses and collection of fees.]

All licenses provided for in Section 705 [60-7-23 NMSA 1978] shall be issued by the chief of division [director of the department of alcoholic beverage control] in strict compliance with the provisions of this act, and license fees, at the rates therein provided, shall be collected by the chief of division [director] and immediately shall be remitted to the state treasurer.

The chief of division [director] is vested with exclusive control over the issuance of, and the collection of license fees for, distiller's, brewer's, rectifier's, winer's and wholesaler's licenses, and, also of, and for, public service licenses, wine bottler's licenses, nonresident licenses and salesman's identification cards; and no additional license fee, occupation license or tax shall be imposed or collected on account thereof by any municipality or county.

(8) § 60-7-29. Limitation on number of licenses that can be issued.

The maximum number of licenses to be issued under the provisions of Sections 60-7-2, 60-7-3 and 60-7-14 NMSA 1978, shall be as follows:

A. in incorporated municipalities, not more than one dispenser's or one retailer's or one club license for each two thousand or major fraction thereof population in such municipality;

B. in unincorporated areas, not more than one dispenser's or one retailer's or one club license for each two thousand or major fraction thereof population in any county excluding the population of incorporated municipalities within the county, provided no new or additional license shall be issued in unincorporated areas or transfers approved for locations or premises

situate within five miles of the corporate limits of any municipality, except that transfer of a license already within the five miles zone may be made:

(1) to another location within the zone; and

(2) from the municipality to a location within the zone;

C. in rural areas new or additional licenses may be issued regardless of population if the proposed location or premises are not within ten miles of any existing licensed premises, provided that such new or additional license and any renewal thereof, issued in such rural areas, either before or after the effective date of Laws of 1957, Chapter 159, Section 1 [this section] shall not be transferred to any other location or premises within ten miles of another licensed premises.

(9) § 60-7-30. [Location of presently licensed premises; population determination.]

For the purposes of this act [60-7-29, 60-7-30 NMSA 1978], all presently licensed locations or premises lying within five (5) miles of the corporate limits of any municipality shall be deemed as lying within the municipality in determining the maximum number of licenses to be issued in said municipality under the provisions hereof and provided further that the population of any incorporated municipality or county shall, for the purpose of this act, be deemed to be the population thereof as last determined by the bureau of census.

(10) § 60-8-3. Grounds for suspension or revocation.

Whenever the liquor control hearing officer, in any hearing provided for in the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-24-7, 60-3-1 to 60-11-4 NMSA 1978] which is conducted in substantial compliance with the provisions of the Liquor Control Act, finds that any liquor licensee has:

A. refused to comply with any provision of the Liquor Control Act;

B. after written notice from the chief of division [director of the department of alcoholic beverage control] or commissioner [director of the revenue division of the taxation and revenue department], neglected to comply with any of the provisions of the Liquor Control Act;

C. refused to comply with any valid rule or regulation adopted and promulgated under the provisions of the Liquor Control Act by the chief of division [director] or commissioner [director];

D. after written notice from the chief of division [director] or commissioner [director], neglected to comply with any valid rule or regulation adopted and promulgated under the provisions of the Liquor Control Act by the chief of division [director] or commissioner [director];

E. made any material false statement in his application for the license granted him under the provisions of the Liquor Control Act;

F. suffered or permitted his licensed retail liquor establishment, dispensary or club to remain a public nuisance in the neighborhood wherein it is located after written notice from the chief of division [director] that investigation by the division [department of alcoholic beverage control] has revealed that the establishment is a public nuisance in the neighborhood; or

G. violated any sections of the Liquor Control Act, he may suspend or revoke the license of the licensee or fine the licensee, or both.

(11) § 60-10-2. [Manufacture or sale or possession for sale when not permitted by act.]

It shall be a violation of this act, except under the terms and conditions of this act permitting it, for any person to manufacture for the purpose of sale, possess for the purpose of sale, offer for sale or sell, any alcoholic liquors in the state of New Mexico.

(12) § 60-10-7. Sale, shipment and delivery unlawful.

A. It shall be unlawful for any person on his own behalf or as the agent of another person, except a licensed New Mexico wholesaler, rectifier or the agent of either, directly or indirectly to sell, or offer for sale, for shipment into the state of New Mexico, or ship into the state of New Mexico any alcoholic liquors unless such person or his principals shall have secured a nonresident license as provided in Section 707 [60-7-26 NMSA 1978] of this act.

B. It shall be a violation of this act to deliver any alcoholic liquors transported into the state of New Mexico unless such delivery is made in accordance with Article 10 [60-10-9 NMSA 1978] of this act.

(13) § 60-10-8. Credit extension by wholesale liquor dealers.

It shall be a violation of the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-13-7, 60-3-1 to 60-11-4 NMSA 1978] for any wholesale liquor dealer to agree to extend credit for the sale of alcoholic liquors to any liquor retailer, dispenser or club licensee for any period more than thirty calendar days from the date of the invoice required under the provisions of Section 60-9-1 NMSA 1978.

(14) § 60-10-10. Offenses by retailers.

It shall be a violation of this act for any retailer:

A. to allow or permit any alcoholic liquors to be drunk or consumed on his licensed premises;

B. to maintain or keep in close proximity to such licensed premises any place for the consumption of alcoholic liquors purchased from him;

C. to sell any alcoholic liquors at any place other than his licensed premises;

D. to sell, possess for the purpose of sale or to have, possess or keep on his licensed premises, liquors not contained in the unopened, original, immediate containers as packed and filled by the manufacturer, rectifier or bottler thereof; or to buy or receive any alcoholic liquor for the purpose of, or with the intent of, reselling the same, from any person other than a duly licensed New Mexico wholesaler or winer;

E. directly or indirectly, or through any subterfuge, to own, operate or control any interest in any wholesale liquor establishment, liquor manufacturing or bottling firm: provided, that this subsection shall not prevent any retailer from owning stock in any corporation which wholesales, manufactures or bottles alcoholic liquors when he owns such stock for investment purposes only.

(15) § 60-10-11. Offenses by dispensers.

It shall be a violation of this act for any dispenser to [sic]:

A. to receive any alcoholic liquors for the purpose of, or with the intent of, reselling the same, from any person other than one duly licensed by the state of New Mexico to sell such alcoholic liquors to dispensers for resale;

B. to sell, possess for the purpose of sale or to bottle any bulk wine, for sale other than by the drink for immediate consumption on his premises;

C. to do any of the things which a retailer is prohibited from doing by Subsection 60-10-10 E NMSA 1978;

D. to sell, or possess for the purpose of sale, any alcoholic liquors at any location or place except his licensed premises or the location permitted under Section 60-7-11 NMSA 1978.

(16) § 60-10-16. Selling or giving liquor to minors; possession; minor defined.

A. It is a violation of the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-24-7, 60-3-1 to 60-11-4 NMSA 1978] for any club, retailer, dispenser or any other person, except the parent or guardian or adult spouse of any minor, or adult person into whose custody any court has committed the minor for the time, outside of the actual, visible personal presence of the minor's parent, guardian, adult spouse or the adult person into whose custody any court has committed the minor for the time, to do any of the following acts:

(1) to sell, serve or give any alcoholic liquor to a minor or to permit a minor to consume alcoholic liquor on the licensed premises;

(2) to buy alcoholic liquor for, or to procure the sale or service of alcoholic liquor to a minor;

(3) to deliver alcoholic liquor to a minor; or

(4) to aid or assist a minor to buy, procure or be served with alcoholic liquor.

B. It is a violation of the Liquor Control Act for any minor to buy, attempt to buy, receive, possess or permit himself to be served with any alcoholic liquor except when accompanied by his parent, guardian, adult spouse or an adult person into whose custody he has been committed for the time by some court, who is acutally [sic], visibly and personally present at the time

the alcoholic liquor is bought or received by him or possessed by him or served or delivered to him.

* * *

F. Violation of this section by a minor with respect to possession is a petty misdemeanor.

(17) § 60-10-26. Loitering of minors.

Loitering of minors consists of the licensee, or his agent, of any liquor-licensed premises permitting a minor under the age of twenty-one years to attend, frequent or loiter in or about the premises without being accompanied by the parent or guardian of the minor.

(18) § 60-10-27. Sale to drunkards and lunatics.

It shall be a violation of this act for any person to sell, serve, give or deliver any alcoholic liquors to, or to procure or aid in the procuration of any alcoholic liquors for any habitual drunkard or person of unsound mind knowing that the person buying, receiving or receiving service of such alcoholic liquors is an habitual drunkard or lunatic.

(19) § 60-10-29. Prostitution; loitering; promoting.

It is a violation of the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-24-7, 60-3-1 to 60-11-4 NMSA 1978] for any liquor licensee or his agent to knowingly:

A. allow prostitution on the licensed premises;

B. allow or permit the loitering of or solicitation by known prostitutes on the licensed premises; or

C. procure a prostitute for a patron or solicit a patron for a prostitute, or both or for a house of prostitution.

(20) § 60-10-30. Hours and days of business; Sunday sales.

A. Alcoholic liquors shall be sold, served, delivered or consumed on licensed premises only during the following hours and days:

(1) on Mondays from 7:00 a.m. until midnight;

(2) on other weekdays from after midnight of the previous day until 2:00 a.m., then from 7:00 a.m. until midnight; and

(3) on Sundays only after midnight of the previous day until 2:00 a.m., except as provided in Subsection B of this section.

B. Any holder of a dispenser's or club license may, upon payment of an additional fee of one hundred dollars ($100.00), obtain a permit to sell, serve or permit the consumption of alcoholic liquors by the drink on the licensed premises on Sundays from 12:00 noon until midnight except as otherwise provided in Subsection C of this section. The permit shall expire on June 30 of each year and may be renewed from year to year upon application for renewal and payment of the required fee. The permit fee shall not be prorated. Sales made pursuant to this subsection shall be called "Sunday sales."

* * *

(21) § 60-10-35. Filling bottles; misrepresentation of liquors.

It is a violation of the Liquor Control Act [7-17-1 to 7-17-11, 7-24-1 to 7-24-7, 60-3-1 to 60-11-4 NMSA 1978] for any dispenser or the servant, agent or employee of any dispenser:

A. to pour into any empty or partially empty bottle which contains or has contained any alcoholic liquor, liquor of a different kind, class, brand, proof or age from that represented by the label, indicia, legend or descriptive matter on the bottle;

B. to have, allow, suffer or permit upon the licensed premises of the dispenser any bottle containing alcoholic liquor of a different kind, class, brand, proof or age from that represented by the label, indicia, legend or descriptive matter appearing on the containing bottle;

C. to expressly or impliedly misrepresent the kind, class, brand, proof or age of any alcoholic liquor served by the drink; or

D. to pour into any empty or partially empty liquor bottle, liquor of the same kind, class, brand and origin as that represented by the label, indicia, legend and descriptive matter appearing on the receptacle bottle.

(22) § 60-10-36. [Offenses concerning drinking on dispenser's premises.]

It shall be a violation of this act for any person to drink any alcoholic liquors in any washroom or toilet of any dispenser, or to drink or consume upon the premises of any dispenser any spirituous liquor or wine purchased therein in in the unbroken package, except wine so purchased to be consumed with meals, or to drink on the premises of any dispenser any alcoholic liquors obtained elsewhere.

(23) § 60-10-37. [Employment of minors prohibited.]

It shall be a violation of this act for any retailer or dispenser knowingly to employ any person under the age of twenty-one years in the sale and service of alcoholic liquors.

(24) § 60-10-39. [Penalties for violation of act and rules or regulations.]

A. The violation of any provision of this act or of any valid rule or regulation promulgated under the provisions of this act

which is not herein declared to be a felony, shall be a misdemeanor, and upon conviction thereof, any person shall be punished by a fine of not more than three hundred dollars [($300)] or by confinement in jail not more than seven months or by both such fine and imprisonment: provided that if a corporation be convicted of such a violation it shall be punished by a fine of not more than one thousand dollars [($1,000)].

B. Any person convicted of a violation of this act which is herein declared to be a felony, if an individual, shall be punished by a fine of not more than five thousand dollars [($5,000)], or by imprisonment in the state penitentiary for not more than five years, or by both such fine and imprisonment in the discretion of the court; but if such person so convicted of such violation be a corporation, it shall be punished by a fine of not more than ten thousand dollars [($10,000)].

APPENDIX J

PERTINENT FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS.

(1) United States Constitution, Art. I, § 8, Clause 3.

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

(2) United States Constitution, Amendment XXI, § 2.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

(3) 18 U.S.C. § 1154.

§ 1154. Intoxicants dispensed in Indian country

(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind

whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

(b) It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the Department of the Army or any officer duly authorized thereunto by the Department of the Army, but this subsection shall not bar the prosecution of any officer, soldier, sutler or storekeeper, attaché, or employee of the Army of the United States who barters, donates, or furnishes in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian.

(c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(4) 18 U.S.C. § 1156.

§ 1156. Intoxicants possessed unlawfully

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-

of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(5) 18 U.S.C. § 3113.

§ 3113. Liquor violations in Indian country

If any superintendent of Indian affairs, or commanding officer of a military post, or special agent of the Office of Indian Affairs for the suppression of liquor traffic among Indians and in the Indian country and any authorized deputies under his supervision has probable cause to believe that any person is about to introduce or has introduced any spirituous liquor, beer, wine or other intoxicating liquors named in sections 1154 and 1156 of this title into the Indian country in violation of law, he may cause the places, conveyances, and packages of such person to be searched. If any such intoxicating liquor is found therein, the same, together with such conveyances and packages of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and one-half to the use of the United States. If such person be a trader, his license shall be revoked and his bond put in suit.

Any person in the service of the United States authorized by this section to make searches and seizures, or any Indian may take and destroy any ardent spirits or wine found in the Indian country, except such as are kept or used for scientific, sacramental, medicinal, or mechanical purposes or such as may be introduced therein by the Department of the Army.

In all cases arising under this section and sections 1154 and 1156 of this title, Indians shall be competent witnesses.

(6) 18 U.S.C. § 3488.

§ 3488. Intoxicating liquor in Indian country as evidence of unlawful introduction

The possession by a person of intoxicating liquors in Indian country where the introduction is prohibited by treaty or Federal statute shall be prima facie evidence of unlawful introduction.

(7) 18 U.S.C. § 3618.

§ 3618. Conveyances carrying liquor

Any conveyance, whether used by the owner or another in introducing or attempting to introduce intoxicants into the Indian country, or into other places where the introduction is prohibited by treaty or enactment of Congress, shall be subject to seizure, libel, and forfeiture.

(8) H.R. 1055, 83d Congress, 1st Session.

83rd Congress
1st Session **H.R. 1055**

IN THE HOUSE OF REPRESENTATIVES
January 6, 1953

Mr. Patten introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

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A BILL

To terminate Federal discriminations against the Indians of Arizona.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That,

wherever the phrase "Federal laws discriminating against Indians" is used in this Act, the phrase shall be construed to include the following and only the following provisions of law: Revised Statutes, sections 467 and 2136, 25 United States Code, section 266; Revised Statutes, section 2138, as amended, 18 United States Code, section 1157; Revised Statutes, section 2135, 25 United States Code, section 265; Revised Statutes, section 2139, as amended, 18 United States Code, sections 1154 and 1156; and section 1 of the Act of July 4, 1884 (23 Stat. 94, 25 U.S.C., sec. 195); all of the said laws being laws which forbid the sale, purchase, or possession by Indians of personal property which may be sold, purchased, or possessed by non-Indians.

SEC. 2. That the said Federal laws discriminating against Indians shall not hereafter apply to any act or transaction within the State of Arizona outside an Indian reservation which is in conformity with the laws of Arizona.

SEC. 3. That the said Federal laws discriminating against Indians shall not hereafter apply to any transaction within an Indian reservation in the State of Arizona which is in conformity with the ordinances of the tribe or tribes having jurisdiction over the said reservation.

SEC. 4. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the Constitution of Arizona, if the people of Arizona shall duly adopt a constitutional amendment repealing the aforesaid paragraphs.

SEC. 5. It shall be the duty of the Secretary of the Interior to cause to be published in the Federal Register any ordinance duly adopted by any Indian tribe or tribes in the State of Arizona which authorizes the sale, purchase, or possession by Indians on that reservation of personal property which may be

sold, purchased, or possessed by non-Indians outside of Indian reservations.

(9) Act of August 15, 1953, Pub.L. 83-277, 67 Stat. 586.

AN ACT

To eliminate certain discriminatory legislation against Indians in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1161. Application of Indian liquor laws."

SEC. 2. Title 18, United States Code, is hereby further amended by inserting in chapter 53 thereof immediately after section 1160 a new section, to be designated as section 1161, as follows:

"§ 1161. Application of Indian liquor laws

"The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."

SEC. 3. The consent of the United States is hereby given to repeal of the third and eleventh paragraphs of article 20 of the constitution of Arizona, and that part of section 1 of article 21 of the constitution of New Mexico relating to the sales of intoxicants to Indians, if the people of Arizona and New

Mexico shall adopt constitutional amendments to accomplish such repeal.

SEC. 4. Section 9 of the Act of June 4, 1920, An Act to provide for allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes (41 Stat. 751), is hereby repealed.

(10) Reclamation Act of 1902, 32 Stat. 390, § 8.

That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

(11) New Mexico Enabling Act, 36 Stat. 557, § 2.

The delegates to the convention thus elected shall meet . . . . After organization they shall declare on behalf of the people of said proposed state that they adopt the Constitution of the United States, whereupon the said convention shall be, and is hereby, authorized to form a constitution and provide for a state government for said proposed state, all in the manner and under the conditions contained in this act. The constitution shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be

repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship; and that polygamous or plural marriages, or polygamous cohabitation, and the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.

Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other

property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe.

* * *

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed state shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.

(12) Act of August 15, 1953, Pub.L. 83-280, 67 Stat. 588.

AN ACT

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section

1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceeding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided,* That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal

offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

APPENDIX K

MEMORANDUM SUMMARIZING DEPARTMENT OF JUSTICE POSITION REGARDING JURISDICTION OVER "VICTIMLESS" OFFENSES COMMITTED BY NON-INDIANS, PRESENTED BY DEPUTY ASSISTANT ATTORNEY GENERAL LARRY A. HAMMOND AT THE FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE HELD IN PHOENIX, ARIZONA ON APRIL 5-6, 1979.

Deputy Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

March 30, 1979

JURISDICTION OVER "VICTIMLESS" OFFENSES COMMITTED BY NON-INDIANS

On March 21, 1979 the Office of Legal Counsel responded to a request from the Deputy Attorney General, Benjamin R. Civiletti, for our opinion on the question whether so-called "victimless" offenses committed by non-Indians on Indian reservations fall within the jurisdiction of the state or federal courts. Several days earlier the Department of Justice filed in the United States District Court for New Mexico a memorandum in support of a motion for summary judgment in a case styled Mescalero Apache Tribe v. Bell in which the Tribe has sought to require the United States to enforce the New Mexico state traffic codes against non-Indians operating vehicles on the Reservation. The following is a summary of the principal conclusions set forth in the opinion and in the memorandum:

(1) Most traffic offenses and other crimes and offenses in which there is not a plainly identifiable "victim" are within the exclusive jurisdiction of the states when that offense is committed by a non-Indian.

(2) Where, however, there is an identifiable Indian victim, or where the conduct in question posed an immediate and direct threat to Indian persons, property, or to specific tribal community interests there is, under the Assimilative Crimes Act, a basis for asserting federal jurisdiction.

(3) Although the issue is not at all free from doubt, it is our judgment that in cases in which there is as discussed in (2) above, a basis for federal jurisdiction the states would not be ousted from jurisdiction, i.e., the jurisdiction of the state and federal governments in these cases would be concurrent.

These conclusions were reached after consultation with the Office of the Solicitor of Interior and with representatives of the Native American Rights Fund and the Litigation Committee of the National Congress of American Indians. These conclusions represent the beginning point, rather than the culmination, of the Department of Justice's efforts to provide coherent and effective law enforcement in those areas left uncertain after the Supreme Court's decision last Term in Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). We anticipate working closely with Interior, the Indian Community, the United States Attorneys, and state law enforcement officials both in the implementation of this opinion, and in considering whether some form of legislative change in the controlling statutes should be proposed.

s/ Larry A. Hammond

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

No. 78-1731

In The Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NEW MEXICO AND JAMES R. BACA, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-22a) is reported at 590 F.2d 323. The district court's findings of fact and conclusions of law (Pet. App. 3a-8a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1978 (Pet. App. 11a). On March 12, 1979, Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including May 17, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1161 requires an Indian tribe owning and operating a liquor outlet on its reservation to obtain a state liquor license.
2. Whether the State of New Mexico has jurisdiction, at tribally owned and operated facilities within the Mescalero Apache Indian Reservation, to enforce its laws governing the possession, sale, service, and consumption of alcoholic beverages.

STATEMENT

Alcoholic beverages are sold at three locations within the Mescalero Apache Indian Reservation.[1] At one of these locations, a tribal bar in Mescalero, New Mexico,

[1] The Mescalero Apache Tribe was recognized by the United States government in the Treaty of July 1, 1852, 10 Stat. 979. The Mescalero Apache Indian Reservation was created by a series of eight executive orders, the first of which was issued on May 23, 1873, and the last on February 17, 1912. Substantially all of the lands within the reservation are held by the United States for the use of the Tribe (Pet. App. 3a). The Tribe has a constitutional government organized pursuant to 25 U.S.C. 476. In 1965, the Tribe adopted an ordinance governing the sale and consumption of alcoholic beverages on the reservation (Pet. App. 4a, 24a-25a). The ordinance was certified by the Secretary of the Interior and published in the Federal Register (30 Fed. Reg. 3553 (1965)).

liquor has been sold for more than ten years without a state license. The sale of alcoholic beverages at the second location, a bar at Apache Summit, is licensed by the State of New Mexico (Pet. App. 5a). The third place at which liquor is sold within the reservation, and the primary focus of this litigation, is the Inn of the Mountain Gods, a tribally owned and operated resort complex, revenues from which are used for "the education, social and economic welfare and governmental needs of the Mescalero Apache people" *(ibid.)*. Since July 1975, alcoholic beverages have been sold at the Inn of the Mountain Gods without a state liquor license.

On April 2, 1965, ten years before the Inn opened, an official of the New Mexico Division of Liquor Control informed the Tribe in a letter that it could establish its own liquor operation on reservation land without coming under the Liquor Division's control (Pet. App. 4a). In September 1975, shortly after the Inn opened, the State adopted a contrary view. Relying on this Court's decision in *United States* v. *Mazurie*, 419 U.S. 544 (1975), the New Mexico Department of Alcoholic Beverage Control ordered the Tribe to "cease all sale, service, possession or the permitting of consumption of alcoholic liquors and intoxicants at the Inn of the Mountain Gods * * * until it has been clearly determined under what conditions the sale, service, consumption, or possession may be allowed" (Pet. App. 27a). The State also ordered liquor wholesalers to cease deliveries to the tribal bars (*id.* at 6a). The State has threatened to send law enforcement officers onto the reservation to enforce New Mexico's liquor laws (*ibid.*).

Because of statutory quotas restricting the number of liquor licenses that may be issued in New Mexico, and because the State refused to approve the transfer of the Apache Summit bar license to the Inn of the Mountain Gods, the Tribe can obtain a license only by purchase or lease from an existing holder. The purchase price for a license is more than $50,000 (Pet. App. 6a).

Acting on its own behalf and on behalf of the Tribe, the United States brought this action in the United States District Court for the District of New Mexico. The complaint sought a declaration that the Tribe had sole authority to license and regulate the sale of liquor through tribally operated outlets located within the reservation. It also sought an injunction prohibiting the State from ordering law enforcement personnel to enforce State liquor laws in connection with the Tribe's sale of alcoholic beverages within the reservation.

The district court granted the relief requested (Pet. App. 1a–10a). The court ruled (*id.* at 7a) that "[a]s between the Mescalero Apache Tribe and the State of New Mexico, the Mescalero Apache Tribe has sole jurisdiction for regulating the licensing, sale, possession and distribution of alcoholic beverages at tribal-owned outlets within the exterior boundaries of the Mescalero Apache Reservation." The court stated that the federal Constitution grants to Congress the sole authority to regulate commerce with the Indian tribes and that "[t]he federal government and the Mescalero Apache Tribe have preempted the State of New Mexico from any jurisdiction it might arguably have had to regulate the licensing of tribal-owned liquor outlets and to regulate the sale of alcoholic beverages at such outlets within the exterior boundaries of the Mescalero Apache Reservation" (*ibid.*). The court held that neither the Twenty-first Amendment nor 18 U.S.C. 1161 authorizes New Mexico to exercise jurisdiction to enforce its liquor laws within the reservation (*ibid.*).

The court of appeals affirmed (Pet. App. 12a–22a). Like the district court, the court of appeals cited Article I, Section 8, Clause 3 of the United States Constitution as the legal basis for Congress' authority to regulate commerce with the Indian tribes (*id.* at 20a). After reviewing the relevant decisions of this Court, the court of appeals concluded (*ibid.*) that "regulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes.

Congress may delegate this authority to the state, but when it does so it must be in specific terms. Section 1161 * * * does not delegate this authority either expressly or impliedly." The court of appeals also rejected New Mexico's argument that the Twenty-first Amendment authorizes States to enforce their liquor licensing laws on Indian reservations (Pet. App. 22a).

ARGUMENT

The decision of the court of appeals is correct and does not warrant further review.

1. This Court has settled that Congress may regulate commerce in liquor with the Indian tribes. *United States* v. *Mazurie*, 419 U.S. 544, 554–555 (1975); *Perrin* v. *United States*, 232 U.S. 478, 482 (1914). Congress has long occupied this field. See, *e.g.*, *United States* v. *43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876). As a consequence, the states are precluded from imposing their own regulatory scheme without congressional consent. This follows from *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), in which the Court invalidated a state tax on persons trading with the Indians on the reservation and held that federal regulation had preempted the field.

Because of the comprehensive federal regulation of commerce with the Indians, this Court has repeatedly ruled that, in the absence of a federal statute specifically authorizing the states to license or tax certain activity by Indians on the reservation, the state cannot exercise such power. *Bryan* v. *Itasca County*, 426 U.S. 373, 376–377 (1976); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480–481 (1976); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 177–181 (1973). See also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). In light of this policy, courts will not interpret a statute to grant States jurisdiction

over Indians on reservations unless there is a clear and unambiguous expression of congressional intent to terminate Indian immunity from state law. *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392-393. Doubtful expressions are resolved in favor of the Indians. *Ibid.*

Congress has not authorized the states to regulate the sale of alcoholic beverages by Indians on the reservation. In particular, Section 1161 of the federal criminal code, on which petitioners rely, does not confer such authority on the states. The statute merely provides that federal criminal laws prohibiting the sale and possession of liquor in Indian country do not apply to any act or transaction that "is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction * * * ." This provision was enacted to give individual tribes the option of retaining the existing federal prohibition against the introduction of liquor into "Indian country" or regulating liquor sales and use in conformity with state law and under an ordinance approved by the Secretary of the Interior. *United States* v. *Mazurie*, *supra*, 419 U.S. at 547. The statute does not address the extension of state control over liquor transactions to Indian reservations.[2] Instead, Section 1161 contemplates that state substantive standards

[2]The language of Section 1161 may be compared to that found in the Clean Air Amendments of 1970, 42 U.S.C. 1857f, and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1323. In *Hancock* v. *Train*, 426 U.S. 167 (1976), and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976), this Court held that the Clean Air Amendments and the FWPCA Amendments do not authorize States to insist that federal air and water pollution control facilities obtain state operating permits. The Court's more recent decision in *California* v. *United States*, 438 U.S. 645 (1978), acknowledged that state permit requirements govern the appropriation of water for federal water projects, but the Court reached that result against the unique backdrop of federal deference to state water law. No such tradition of deference to the states exists where Indians and their activities on a reservation are concerned.

concerning such matters as hours of sale or sale to minors will be incorporated by reference in much the same way as state law is incorporated for purposes of defining federal offenses under the Assimilative Crimes Act. See 18 U.S.C. 13, 1152.[3]

The statutory reference to state law defines an exemption from the federal prohibitions regarding the introduction of liquor into Indian country. If alcoholic beverages are sold on a reservation in violation of the applicable state law, the exemption provided in Section 1161 will not apply, and the offending parties will be subject to prosecution under one or more of the federal criminal provisions enumerated in Section 1161 (*i.e.*, 18 U.S.C. 1154, 1156, 3113, 3488, 3618). But Section 1161 evidences no intent to extend state jurisdiction or enforcement authority to the activities of Indians on the reservation.[4]

[3]The model of the Assimilative Crimes Act demonstrates the fallacy in petitioners' argument that Congress must have intended that the state enforce state law on Indian reservations because uniform administration demands that a single prosecutor be empowered to apply and interpret state law in a consistent fashion.

[4] Because federal criminal prosecution remains a possible consequence if the sale of liquor on the reservation does not conform with state law, the effect of the court of appeals' decision will hardly be as drastic as petitioners suggest. Petitioners incorrectly state (Pet. 11-12; footnote omitted) that the Tenth Circuit's decision "would preclude even a federal prosecution under Section 1154 or 1156 for failure to comply with State law." In support of this proposition, they state (Pet. 12 n.5) that "the United States is permitting the Inn of the Mountain Gods to operate without conforming to the licensing requirement of State law." The response to this argument is twofold. In the first place, Section 1161's incorporation of state law does not necessarily mean that Indians desiring to sell liquor on the reservation must comply with state licensing provisions as well as substantive state laws concerning the hours during which liquor may be sold, the sale of liquor to minors, and other such matters. The better view appears to be that, when Congress

Petitioners also contend (Pet. 16–21) that the ruling of the courts below prohibits the States from enforcing the criminal provisions of their liquor laws against non-Indians on the reservation and is therefore inconsistent with this Court's decisions in *United States* v. *McBratney*, 104 U.S. 621 (1881), *Draper* v. *United States*, 164 U.S. 240 (1896), and *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). Those cases involved violent crimes by non-Indians against non-Indians on the reservation; they are inapposite to the situation presented here. The ruling below does not directly discuss New Mexico's authority to enforce its liquor laws with respect to establishments owned and operated by non-Indians on the reservation, and no such question is involved in this litigation. The only matter now in controversy is whether the Mescalero Apache Tribe must have a state liquor license in order to sell alcoholic beverages at the Inn of the Mountain Gods. The district court and the court of appeals correctly answered that question in the negative.

2. The court of appeals correctly ruled (Pet. App. 22a) that the Twenty-first Amendment does not authorize the States to enforce their liquor licensing laws on Indian reservations. The Amendment prohibits the "transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof * * * ." But the Mescalero Apache Reservation is a jurisdiction separate and apart from the State of New Mexico. Liquor transported to the reservation for sale and consumption on the reservation is not brought into New Mexico "for delivery or use therein." The delivery and use is on the reservation and under a distinct sovereignty. Just as the Twenty-first Amendment does not authorize the states to regulate the sale of liquor on national park lands within state borders, so it does not expand the jurisdiction of the states to reach within the boundaries of Indian reservations. See *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 536–538 (1938).

enacted Section 1161 in 1953, it intended to permit Indian tribes to decide to sell and use liquor on the reservation to the same extent that the surrounding State permits such sale and use or to some lesser extent set forth in a tribal ordinance. There is no indication in Section 1161 that Congress intended to compel Indian tribes to seek a state license for each location on the reservation at which a tribe wishes to sell liquor. Moreover, even if this was Congress' intent, a tribe's failure to obtain a license required by a state law would give rise to a violation of *federal*, not state, law. If a failure to obtain a license meant that subsequent sales of liquor by Indians were not in conformity with state law, within the meaning of Section 1161, then the exemption provided by Section 1161 would no longer be available and the sales would violate 18 U.S.C. 1154 and 1156. Although federal prosecution might be appropriate in such instances, there would still be no justification for petitioners' insistence that the State itself could enforce its licensing requirements on the reservation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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JULY 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

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Director, Department of Alcoholic Beverage Control,
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v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

Most of the argument of the United States has been addressed in the Petition, and we will not restate our position here. Some points in the Brief in Opposition, however, warrant a further response.

1. The United States argues that, in the absence of an unambiguous expression of Congressional intent, States may not license or tax Indians on an Indian reservation. According to the United States, Section 1161 does not clearly express Congressional intent to impose State liquor licensing laws on an Indian reservation. Rather, it is said, Section 1161 merely incorporates State

"substantive standards" in much the same way as State law is incorporated for purposes of defining federal offenses under the Assimilative Crimes Act. 18 U.S.C. § 13. This argument is facile but false. It ignores the language of the statutes, the legislative history of Section 1161, and the facts of this case.[1]

In the first place, the Assimilative Crimes Act does not rely upon or apply some vague notion of State law "substantive standards." It incorporates all of the features of the State criminal code, except in the case of a specific federal crime, and makes the State offense, in all of its particulars, a federal offense. Thus, if the Congress had intended State law to apply in this situation on the "model" of the Assimilative Crimes Act, it would have used the Act itself to accomplish this task.[2]

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[1] Among the facts ignored is that on January 9, 1965, the Mescalero Apache Tribe adopted a tribal ordinance—later approved by the Under Secretary of the Interior and published in the Federal Register (see App. F 24a-25a)—which specifically provided that the "introduction, sale and possession of intoxicating beverages shall be lawful within the Indian country under the jurisdiction of the Mescalero Apache Indian Tribe: *Provided*, that such introduction, sale and possession is in conformity with the laws of the State of New Mexico * * *." *Id.* Thus, the Tribe itself recognized the need for State regulation, and it is only the United States that refuses to do so.

[2] The manner in which Congress would have acted if it had intended full federal control and enforcement is also illustrated by one of the primary cases cited by Respondent, *Warren Trading Post Co.* v. *Arizona Tax Com'n*, 380 U.S. 685 (1965). There, the Commissioner of Indian Affairs, acting pursuant to a series of statutes, "promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed," the "conduct forbidden on a licensed trader's premises," and many other factors. *Id.* at 689. These were considered by this Court to be "all-inclusive regulations and statutes," which left "no room * * * for state laws imposing additional burdens upon traders." *Id.* at 690; footnote deleted. The State, therefore, simply had "no duties or responsibilities respecting the reservation Indians * * *." *Id.* at 691. Section 1161, on the other hand, does not in any way attempt to federally preempt the subject with which it deals.

If the United States were right in its interpretation, Section 1161 would pose problems of constitutional dimension. The lack of precision in the application of State law under the argument advanced by the United States would raise serious questions of due process and equal protection. The attachment of criminal liability, whether federal, State or both, in the event of an offense, requires the explicit and strict application of the governing law, as is done by the Assimilative Crimes Act, not the uncertain standard espoused by the United States with respect to Section 1161 in this case. The United States fails to explain what restrictions are imposed by State "substantive standards" and what State restrictions are excluded from application. A man of common intelligence likewise could not discern what is permissible and what is not.

Secondly, the language of Section 1161 makes no distinction between State "substantive standards" and other provisions of State law. The licensing provisions are just as much a part of the liquor laws of the State of New Mexico as are matters relating to hours of service, sales to minors, and the like. Moreover, the United States, so far as this record shows, is not even enforcing New Mexico's provisions with regard to hours of service, sales to minors, or any other matter.[3]

Thirdly, the argument of the United States that Section 1161 does not apply State law to Indian activity on an Indian reservation wholly ignores the admitted facts of this case that sales of liquor to the Mescalero Apache Tribe are made by non-Indians, that non-Indians manage the Inn and dispense liquor there, and that non-Indians

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[3] Indeed, it was the federal government's failure to enforce the prohibition laws and the consequent effect of liquor-related offenses both on and off Indian reservations which provoked the passage of Public Law 280 and Section 1161. "State Legal Jurisdiction in Indian Country" Hearings on HR 459, HR 3624, 82nd Cong., 1st Session (1952).

are the overwhelming majority of consumers of liquor at the Inn. The argument of the United States would create a class of wholesale state law violators. The text of Section 1161, which requires "conformity both with" State law and tribal ordinance, precludes this conclusion.[4]

Thus, under the circumstances of this case, the position of the United States is wholly untenable. The federal statute provides in effect that liquor regulation on Indian land shall conform with State law. The Mescaleros have adopted a tribal ordinance specifically declaring that liquor regulation on their land shall conform with State law. Yet liquor regulation on the reservation is flagrantly in disregard of State law—it is, in fact, in direct conflict with that law. The State is powerless to act without being in contempt of a federal court order which was entered at the behest of the United States, the same party that argues to this Court that no one need be concerned with State law, because the United States has sole authority to enforce it!

2. The United States either ignores or mistakes the situation in regard to liquor transported into the State. Its brief says that "Liquor transported for sale and consumption on the reservation is not brought into New Mexico 'for delivery or use therein.' The delivery and use is on the reservation and under a distinct sovereignty" (p. 9). This is simply not true. No liquor is transported across the New Mexican border designated for delivery to or use on any Indian reservation. All such liquor is transported directly to non-Indian wholesalers operating in the normal fashion within the State. These wholesalers, located *off* Indian reservations, sell primarily to

[4] Indeed, even after the passage of Section 1161, liquor could not be possessed or sold on an Indian reservation in the State of New Mexico until the Constitution of New Mexico was amended to strike the prohibition against liquor on Indian reservations, which had been required by the State's enabling act. P.L. 83-277, § 3 (App. 532-542); 36 Stat. 557, § 2 (App. 542-562).

non-Indians. To the extent that members of the Mescalero Tribe buy from these wholesalers, they buy at random from stock that has completely come to rest within the State for general sale and use.[5] Yet the effect of the injunction issued below is to prevent New Mexico from regulating this liquor that has become part of the total alcoholic beverage supply in the State, if a wholesaler happens to sell to an Indian rather than a non-Indian.

This result stands on their heads such cases as *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), which held that even Indians selling to non-Indians on their own Reservations had to collect and pay the normal State sales tax, for otherwise "* * * the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax" (*id.* at 482; emphasis in original). The United States would somehow use this case as an excuse to deprive the State of New Mexico of its otherwise-uninhibited power to regulate the liquor sales of non-Indian, off-reservation wholesalers whose contact with Indians is incidental at best.

[5] The Mescalero Apache Reservation is not an Arsenals and Dockyards Clause exclusive legislation enclave, such as Yosemite National Park was in *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), or Fort Sill in *Johnson* v. *Yellow Cab Co.*, 321 U.S. 382 (1944), or the base involved in *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363 (1963). It is within the territorial limits of New Mexico, and New Mexico's laws extend on the reservation except as precluded by Congress. *Mescalero Apache Tribe* v. *Jones, Comm'r of Revenue*, 411 U.S. 145 (1973); *United States* v. *McGowan*, 302 U.S. 535 (1938). Each of the cases ruling that the Twenty-First Amendment does not apply to exclusive legislation enclaves involved direct shipment from out of state to the enclave, so there was no intrastate traffic, no incident upon which State law would attach. *Collins, supra; Yellow Cab, supra; Mississippi Tax Comm'n, supra.*

As to these wholesalers, the rule is that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones, Comm'r of Revenue, supra*, 411 U.S. at 148-149.

In sum, the United States has demonstrated in its brief why review by this Court is fully warranted, since the questions presented not only are of extraordinary importance to this and other States but are subject to sharp dispute between the parties.

Respectfully submitted,

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